TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 42.

TIMOTHY F. PADDELL, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MARCH 14, 1907.

(20,617.)

(20,617.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 652.

TIMOTHY F. PADDELL, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a In Court of Appeals.

TIMOTHY F. PADDELL, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

Record on Appeal.

Keith & Abbot, Attorneys for Appellant, 45 Cedar Street, New York City.
John J. Delany, Corporation Counsel, Attorney for Respondent, 2 Tryon Row, New York City.

1 Supreme Court, Appellate Division, First Department.

TIMOTHY F. PADDELL, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

Statement Under Rule 41.

This action was begun by the service of the summons with a copy of the complaint on the 27th day of February, 1906. The demurrer thereto was served on the 17th day of March, 1906.
The names of the original parties in full are as stated above. There has been no change in the parties.

2 *Summons.*

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.
Trial desired in the County of New York.
Dated, New York, February 26, 1906.

KEITH & ABBOT,
Plaintiff's Attorneys.

Office and Post Office Address, 45 Cedar Street, New York City, N. Y.

3 *Complaint.*

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

The plaintiff, by Keith & Abbot, his attorneys, complaining of the defendant, alleges as follows:

I.

The defendant is, and during all the times hereinafter mentioned has been, a municipal corporation organized and existing by virtue of an act of the Legislature of the State of New York, passed May 4, 1897, being Chapter 378 of the Laws of 1897, and known as "The Greater New York Charter," which act is a public act of which the courts are required to take judicial notice.

II.

The plaintiff is the owner, subject, however, to two certain mortgages as hereinafter more particularly stated, of certain premises in the City of New York, Borough of Manhattan, known as Numbers 592, 594 and 596 Seventh Avenue, in the said City and Borough.

4 The said premises are subject to a mortgage dated the 9th day of March, 1903, and recorded in the office of the Register of the County of New York on the 9th day of March, 1903, in the record of mortgages, Section 4, Liber 128, page 186, which mortgage was executed and delivered by the plaintiff to the Bank for Savings to secure the payment of his certain bond therein mentioned, conditioned for the payment of the sum of $70,000. No part of said sum has been paid by the plaintiff and the whole thereof was on the second Monday of January, 1906, and is now, a lien on the premises aforesaid.

The said premises are also subject to a mortgage dated the 28th day of June, 1905, and recorded in the office of the Register aforesaid on the 28th day of June, 1905, in the record of Mortgages, Section 4, Liber 158, page 491, which mortgage was executed and delivered by the plaintiff to The Title Guarantee & Trust Company to secure the payment of all moneys advanced by the said company to the plaintiff under a building loan agreement in said mortgage mentioned, which moneys, so advanced as aforesaid, amounted on the said second Monday of January, 1906, and now amount, to the sum of $45,000. No part of said sum has been paid by the plaintiff and the whole thereof was on the said second Monday of January, 1906, and now is, a lien on the premises aforesaid.

The total amount secured to be paid by the mortgages aforesaid and on the said second Monday of January, 1906, constituting a lien on the said premises, and now constituting a lien thereon, is $115,000.

III.

The plaintiff is informed and believes, and alleges upon such information and belief, that the defendant, through and
5 by means of the following acts and proceedings done or had, or about to be done or had, is about to create a lien, incumbrance or cloud upon the premises hereinbefore described and upon the interest and title therein of the plaintiff, for taxes to be imposed upon the plaintiff by the defendant for the year 1906 in respect of the real estate owned by the plaintiff:

1. The Department of Taxes and Assessments, a duly organized department of the defendant, has prepared and now keeps in its office in the Borough of Manhattan certain books which are called "The Annual Record of the Assessed Valuation of the Real and "Personal Estate of the Borough of Manhattan," in which are entered in detail the assessed valuations of such property within the limits of the Borough of Manhattan for the year 1906. The said books were opened for examination and correction on the second Monday of January, 1906, and will, as the plaintiff is informed and believes, and alleges upon information and belief, remain open for such examination and correction until the first day of April, 1906.

2. In one of the books aforesaid, to wit, the book entitled Section 4, Volume 1, to which is appended an oath of one of the deputy tax commissioners, officers of the defendant appointed by the Board of Taxes and Assessments aforesaid, it is stated, upon the oath aforesaid, that the plaintiff is the owner of the premises hereinbefore described and that the said premises with their improvements will, under ordinary circumstances, in the judgment of the aforesaid deputy tax commissioners, sell for the sum of $160,000.

3. In the valuation of the aforesaid premises, as the plain-
6 tiff is informed and believes and alleges upon such information and belief, no deduction or allowance has been made on account of the mortgages aforesaid.

4. The plaintiff, on or about the ninth day of February, 1906, and during the time that the books aforesaid were open to public inspection as aforesaid, duly made application in writing to the Board of Taxes and Assessments, the head of the Department of Taxes and Assessments aforesaid, to have the assessed valuation of his real estate corrected, stating the facts as to ownership of the said premises to be as hereinbefore alleged, and stating the grounds of his objection to be that the assessment aforesaid should be reduced by the amount secured to be paid by the mortgages aforesaid.

5. Notwithstanding the application of the plaintiff so made in writing as aforesaid, and notwithstanding the facts made known to them as aforesaid, the said Board of Taxes and Assessments has refused, and still refuses, to make any correction in the said assessment.

6. By reason of the aforesaid refusal of the said Board of Taxes and Assessments, the following proceedings, as the plaintiff is informed and believes and alleges upon such information and belief, are about to be had and the following acts are about to be performed

by the defendant, its officers, attorneys, agents, servants, or employés:

Beginning with the first day of April, 1906, the said Board of Taxes and Assessments will cause to be prepared from the books of annual record of assessed valuation of real and personal estate
7 aforesaid assessment-rolls for the Borough of Manhattan, and will, as soon as such rolls are completed, annex to each of said rolls their certificates that the same is correct in accordance with the entries in said several books of record. Upon the assessment-rolls aforesaid the plaintiff will be assessed as the owner of the premises hereinbefore described and the said premises will be assessed at the aforesaid valuation of $160,000.

The said rolls so certified will on the first Monday of July, 1906, be delivered by the Board of Taxes and Assessments to the Board of Aldermen, in which is vested the legislative power of the defendant, which will meet at noon on that day at the City Hall for the purpose of receiving the same, and for the purpose of performing such other duties in relation thereto as are prescribed by law.

The Board of Aldermen aforesaid will thereupon estimate and set down in a column to be prepared for that purpose in the assessment-rolls aforesaid opposite to the several sums set down as the valuation of real and personal property, the respective sums, in dollars and cents, to be paid as a tax thereon, rejecting the fractions of a cent, and, in particular, the Board of Aldermen will estimate and set down in the column aforesaid, opposite the valuation of the premises hereinbefore described and opposite the name of the plaintiff as owner thereof, a sum to be paid by the plaintiff as a tax thereon which will be estimated upon the valuation of $160,000 hereinbefore stated.

On or before the fifteenth day of September, 1906, the Board of Aldermen will deliver to the Receiver of Taxes, an officer of the defendant the said assessment-rolls, or a fair copy thereof, with the proper warrant or warrants annexed thereto, signed by the
8 President of the Board of Aldermen and countersigned by the City Clerk, an officer of the defendant, directing and requiring him, the said Receiver of Taxes, to collect from the several persons named in the assessment-rolls, including the plaintiff, the several sums mentioned in the last column of such roll, opposite to their respective names, and to pay the same from time to time when so collected, to the Chamberlain of the defendant.

The tax so to be laid on the plaintiff as aforesaid, besides being a personal debt of the plaintiff, payable out of his general assets, will become, and will continue to be until paid, a lien on the premises hereinbefore mentioned and on the plaintiff's title and property interest therein, and will be preferred in payment to all other charges.

IV.

The plaintiff has not been assessed for taxes to be imposed upon him by the defendant for the year 1906 in respect of any personal estate owned by him.

V.

The plaintiff is advised by his counsel and believes, and alleges upon information and belief, that the lien upon his property so about to be established as aforesaid, and the personal liability so about to be laid upon the plaintiff as aforesaid, are wholly unauthorized by any law or statute of the State of New York, and that if the said lien and the said personal liability are in fact authorized by any law or statute of the said State, then the law or statute authorizing them is unconstitutional and void for the following reasons:

It is repugnant to Article I, §6, of the constitution of the
9 said State because it authorizes and enables the defendant to impose taxes upon its citizens by means of oaths which are false in fact, in that an assessment of property at its full valuation without deducting or allowing for any mortgage-debt secured thereby, together with an assessment of the mortgage debt at its full valuation as another and simultaneously existing property, involves a declaration under oath by the taxing officers that there is more property in existence than actually exists, and thus authorizes and enables property to be taken without due process of law.

It is repugnant to Article I, § 6, of the said Constitution, because it authorizes and enables the defendant to tax some of its citizens on more property than they possess, while other of its citizens are not so taxed, and thus takes private property for public use without just compensation.

It is repugnant to Article XIV, § 1, amending the Constitution of the United States of America, because the State of New York thereby authorizes and enables the defendant to impose taxes upon its citizens by means of oaths which are false in fact, in that an assessment of property at its full valuation without deducting or allowing for any mortgage-debt secured thereby, together with an assessment of the mortgage-debt at its full valuation as another and simultaneously existing property, involves a declaration under oath by the taxing officers that there is more property in existence than actually exists, and thus authorizes and enables property to be taken without due process of law.

It is repugnant to Article XIV, § 1, amending the Constitution of the United States aforesaid, because the State of New York thereby
10 authorizes and enables the defendant to tax some of its citizens on more property than they possess, while other of its citizens are not so taxed, and thus denies to the former the equal protection of the laws.

VI.

The plaintiff is further informed by his counsel and believes, and alleges upon such information and belief, that he has no adequate remedy at law in the premises, for the reason that no remedy at law will stay the creation of a cloud upon his title and a lien upon the premises hereinbefore described, or will stay the collection of taxes which will be imposed in violation of the laws and Constitution of the State of New York and the Constitution of the United States of

America; and that if he should refuse to pay such illegal and unconstitutional taxes, his title would be clouded and a lien would be placed upon his property and he would be subject to actions by the Bank for Savings and The Title Guarantee & Trust Company aforesaid to foreclose their several mortgages upon the ground of a breach of covenants contained in the said mortgages whereby he agrees to keep the premises aforesaid free and clear of the lien of all taxes.

Wherefore, the plaintiff prays judgment against the defendant that the defendant, its officers, attorneys, agents, servants and employés be enjoined and restrained from taking any further proceeding and from doing any further act which shall create or tend to create any interest in, or lien, incumbrance, or cloud upon, or enlarge or make more definite, or tend to enlarge or make more definite, any existing interest in, or lien, incumbrance, or cloud upon the premises hereinbefore described for taxes to be paid by the plaintiff in respect of any property interest
11 in the said premises which is in excess of the plaintiff's equity therein, that is to say, in excess of the plaintiff's property interest over and above the mortgages thereon, and that the defendant and every person claiming under it be barred from all claim to any interest, lien, or incumbrance now existing, or hereafter to exist in or upon the said premises for any such taxes as aforesaid, and for such other and further relief, together with the costs and disbursements of this action, as to the Court shall seem just.

And the plaintiff further prays for an order that during the pendency of this action the defendant be enjoined and restrained from all the acts and proceedings aforesaid.

KEITH & ABBOT,
Attorneys for Plaintiff, 45 *Cedar Street, New York City.*

STATE OF NEW YORK, *County of New York, ss:*

Timothy F. Paddell, being duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

TIMOTHY F. PADDELL.

Sworn to before me this 26th day of February, 1906.

AMY HACKES,
Notary Public No. 210, *New York County.*

12 *Demurrer.*

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

The City of New York, defendant above named, demurs to the complaint herein of Timothy F. Paddell, the above-named plaintiff, on the ground that it appears upon the face thereof that the said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, the defendant demands judgment against the plaintiff dismissing the said complaint, with costs.

New York, March 17, 1906.

JOHN J. DELANY,
Corporation Counsel, Attorney for Defendant,
2 Tryon Row, New York City.

13 *Decision.*

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Before Mr. Justice Blanchard, Special Term, Part III.

The issues of law arising upon the defendant's demurrer to complaint herein having come duly on for trial before me at a Special Term, Part III of this Court, on the 18th and 19th days of April, 1906.

Now, after hearing Mr. George S. Coleman, Assistant Corporation Counsel, of counsel for defendant in support of said demurrer, and Mr. Everett V. Abbot, of counsel for plaintiff, in opposition thereto, and due deliberation having been had,

I decide and find as follows:

Conclusions of Law.

I. That the complaint upon the face thereof does not state facts sufficient to constitute a cause of action against the defendant.

II. That the defendant is entitled to judgment sustaining the demurrer and dismissing the complaint herein with costs.

14 I therefore direct that judgment be entered accordingly.

Dated, New York, May —, 1906.

JAMES A. BLANCHARD,
Justice of the Supreme Court.

Judgment.

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

The issues of law arising upon the defendant's demurrer to the complainant herein having been duly tried before the Hon. James A. Blanchard, Justice, at a Special Term, Part III of this Court, on the 18th and 19th days of April, 1906, and the Court having reserved decision, and after due deliberation the Court having filed a decision in the office of the Clerk of the County of New York on the 10th day of May, 1906, sustaining the said demurrer and directing judgment in favor of the defendant dismissing the complaint herein with costs, and the costs of the defendant having been
15 duly taxed at the sum of Forty-six dollars and eighty-five cents ($46.85), now on motion of John J. Delany, Corporation Counsel, it is

Ordered and adjudged that defendant's demurrer to the complaint herein be and the same hereby is sustained and that the complaint herein be and the same hereby is dismissed; and it is further

Ordered and adjudged that the above-named defendant recover of the above-named plaintiff Timothy F. Paddell, the sum of Forty-six and eighty-five one-hundredths dollars ($46.85), the amount of its costs as taxed and that it have execution therefor.

Dated, New York, May 10th, 1906.

PETER J. DOOLING, *Clerk.*

Exception.

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

SIRS: Please take notice that the plaintiff hereby excepts to each and all of the conclusions of law made by Hon. James A.
16 Blanchard, before whom the issues in this case were tried, and filed as his decision in the office of the Clerk of the County of New York on the 10th day of May, 1906, and to each and every part thereof.

Dated, New York, May 11th, 1906.

Yours, &c.,

KEITH & ABBOT,
Attorneys for Plaintiff, 45 Cedar Street, New York City, Manhattan.

To John J. Delany, Esq., Corporation Counsel.
Peter J. Dooling, Esq., Clerk of the County of New York.

17 *Notice of Appeal.*

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

SIRS: Please take notice that the plaintiff hereby appeals to the Appellate Division of the Supreme Court, First Department, from the judgment of this Court entered in the office of the Clerk of the County of New York on the 10th day of May, 1906, upon the decision rendered by Mr. Justice Blanchard and filed in the said Clerk's office on the 10th day of May, 1906, and from each and every part of said judgment.

Dated, New York, May 11th, 1906.

Yours, &c.,

KEITH & ABBOT,
Attorneys for Plaintiff, 45 Cedar Street,
New York City, Manhattan.

To John J. Delany, Esq., Corporation Counsel.
Peter J. Dooling, Esq., Clerk of the County of New York.

18 *Opinion.*

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

BLANCHARD, *J.:*

This is an action to restrain the creation of a cloud upon title, and to secure an injunction against creating a lien for taxes to be levied and collected from the plaintiff as the alleged owner of certain real property. The premises in question were assessed for taxes for the year 1906 in the sum of $160,000. At the time of the assessment, the premises were subject to two mortgages, aggregating $115,000. The plaintiff seasonably applied to the commissioners of taxes and assessments for the deduction from the assessed valuation of the amount of said mortgages, but his application was denied, and accordingly he brings the present action. The defendant demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action. Briefly stated, the plaintiff's contention is that the assessment of the commissioners involves a fiction as to the amount of property in existence, and, therefore, involves a
19 false oath, and is wholly unauthorized by any law or statute of the State of New York; and that if in fact it be authorized

by any such law or statute, it is unconstitutional as being repugnant to Article 1, Section 6, of the State constitution, and to Article 14, Section 1 of the Federal constitution. Section 3 of the Tax Law provides: "All real property within this State, and all personal property situated or owned within this State, is taxable, unless exempt from taxation by law." Section 1 provides that the assessment roll shall contain a statement of "the quantity of real property taxable to each person," the "full value of such real property," and "the full value of all the taxable personal property owned by each person respectively, after deducting the just debts owed by him." The construction placed by the assessing authorities upon these sections, and upon the analogous provisions of earlier enactment, which they have superseded, has been, from time immemorial, to deduct debts only from the taxpayer's personal property, and to make no such deduction from the taxpayer's real property. The tax is imposed upon "all real property within this State," and although the tax is entered in the assessment roll as taxable to the reputed owner or occupant of the premises, and in the ordinary case is paid by such person from his available funds, it is none the less a tax upon the real estate which happens to be in his ownership or possession, and not a tax upon him because of his individual wealth, or, as the economic theorists describe it, his "ability to contribute to the State." Thus, Section 9 of the Tax Law provides: "In all cases the assessment shall be deemed as against the real property itself, and the property itself shall be holden and liable to sale for any tax levied upon it."

This distinction which sufficiently explains the decision in People *ex rel.* Weber Piano Co. *v.* Wells (180 N. Y., 62), was apparently overlooked by the learned counsel for the plaintiff in relying upon said case as an authority for his contention. The taxation of real property, regardless of ownership or terms of ownership, is perhaps a survival of an archaic system of governmental levy, more suited to the primitive land tenure of mediaeval England than to the complexity of realty interests in modern New York (Seligman: Essays on Taxation, 3d ed., 43-53, and authorities cited). In framing systems of taxation of real and personal property which should fairly distribute the burden among the infinite forms of wealth which characterize present society, many States have doubtless traveled far from the general property tax of New York (Seligman: Essays on Taxation, 3d ed., 97-107, 105-339, and authorities cited). It is not sufficient, however, for the plaintiff to point to these examples and to the considerations which have influenced them, nor to show that the present assessment is unscientific and unfair under modern conditions. The plaintiff must further show that it is illegal. Since, as has been shown, the tax is imposed upon "all real property within the State," and only consequently upon the owners thereof, there is clearly no false oath involved in an assessment which states merely the value of the tangible real estate, and the holder of the legal title or the occupant thereof. Since there is no express statutory provision exempting, in whole or in part, real property encumbered by mortgage, the usual presumption against exemption must apply, and the assessment of the realty at its un-

diminished value must be regarded as authorized by statute. In view of these considerations, the able argument of the learned
21 counsel for the plaintiff regarding the unscientific and unfair character of the present assessment seems beside the point, and more properly addressed to the Legislature than to this court. Since the assessment is authorized by statute, the only question remaining is whether such a statute is repugnant to the State and Federal constitutions, in that it purports to authorize the taking of private property for public use, without just compensation, or the taking of property without due process of law, or denies the plaintiff the equal protection of the laws. No constitutional provision exists which requires equality and uniformity in the tax assessment in New York. The present mode of assessment, which lays one burden upon the mortgagee and another burden upon the realty which is the subject of the mortgage, obviously does not require the same subject of taxation to contribute directly twice to the same burden. Merely because the mode of assessment is so crude that it results in shifting upon the same person, by reason of his ownership of particular property, several burdens of taxation, when fairness would suggest only one, is no ground for holding the mode of assessment unconstitutional (Gray: Limitations of Taxing Power, Secs. 1360, 1362, 1370 and 1395; Cooley: Taxation, 3d ed., vol. 1, pp. 389-397, and authorities cited). Since the present assessment was validly made, it becomes unnecessary to examine the propriety of the remedy asked in the complaint, and the demurrer is therefore sustained. In accordance with the request of both parties, judgment absolute will be entered for the defendant.

22 *Stipulation.*

It is hereby stipulated that the foregoing consists of true copies of the judgment-roll in this action, the notice of exception and notice of appeal herein, and of the whole thereof, all of which are now on file in the office of the Clerk of the County of New York, and certification thereof is hereby waived.

Dated, New York, May 16, 1906.

KEITH & ABBOT,
Attorneys for Plaintiff-Appellant.
JOHN J. DELANY,
Corporation Counsel.

23 *Order of Affirmance.*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 12th day of July, 1906.

Present: Hon. Morgan J. O'Brien, Presiding Justice.
Hon. Chester B. McLaughlin,
Hon. Frank C. Laughlin,
Hon. John Proctor Clarke,
Hon. James W. Houghton, Justices.

8820.

TIMOTHY F. PADDELL, Appellant,
vs.
THE CITY OF NEW YORK, Defendant.

Order of Affirmance on Appeal from Judgment on Demurrer.

An appeal having been taken to this Court from a judgment of the Supreme Court sustaining a demurrer to the complaint in this action entered in the office of the Clerk of the County of New York on the 10th day of May, 1906, and the said appeal having been argued by Mr. Everett V. Abbot, of counsel for the appellant, and by Mr. George S. Coleman, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby affirmed; and that the respondent recover of the appellant the costs of this appeal.

M. J. O'BRIEN.

24 *Judgment of Affirmance.*

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

The above named plaintiff having appealed to the Appellate Division of the Supreme Court, First Department, from the judgment herein entered and filed in the office of the Clerk of the County of New York on the 10th day of May, 1906, sustaining defendant's demurrer to the complaint herein and dismissing the complaint with costs, and the said appeal having been duly argued at the said Appellate Division and an order having been duly entered in the office of the Clerk of said Appellate Division on the 12th day of July, 1906, unanimously affirming the said judgment so appealed from as aforesaid, with costs of this appeal, and the costs of this defendant having been duly taxed at the sum of $70.65,

Now on motion of John J. Delany, Corporation Counsel, it is

Unanimously adjudged that the said judgment so appealed from as aforesaid be and the same hereby is affirmed, and it is further

Adjudged that the above named defendant The City of New York recover of the above named plaintiff Timothy F. Paddell, the sum of Seventy ($70.65) and 65-100 dollars, the amount of its costs as taxed and that it have execution therefor.

25

Dated, New York, July 26th, 1906.

PETER J. DOOLING, *Clerk.*

Notice of Appeal.

Supreme Court, County of New York.

TIMOTHY F. PADDELL, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

SIRS: Please take notice that the plaintiff appeals to the Court of Appeals from the judgment of this Court entered herein in the office of the Clerk of this Court on the 26th day of July, 1906, affirming the judgment of this Court entered in the same office on the 10th day of May, 1906, and from each and every part thereof and from the judgment so affirmed.

Dated, New York, July 26th, 1906.

Yours, &c.,
KEITH & ABBOT,
Attorneys for Plaintiff-Appellant,
45 Cedar Street, New York City.

To John J. Delany, Esq., Attorney for Defendant-Respondent.
Peter J. Dooling, Esq., Clerk.

26 *Affidavit of No Opinion.*

In Court of Appeals.

TIMOTHY F. PADDELL, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

COUNTY OF NEW YORK, *ss:*

Everett V. Abbot, duly affirming, says:

I am one of the attorneys for the appellant upon this appeal. No opinion was rendered herein by the Appellate Division.

EVERETT V. ABBOT.

Affirmed before me this 3rd day of August, 1906.

AMY HACKES,
Notary Public No. 33, New York County.

Stipulation.

It is hereby stipulated that the foregoing consists of true copies of the judgment roll in this action, the notice of appeal herein to the Court of Appeals and of the whole thereof, all of which are now on file in the office of the Clerk of the County of New York, and certification thereof is hereby waived.

Dated, New York, August 21st, 1906.

KEITH & ABBOT,
Attorneys for Plaintiff-Appellant.
JOHN J. DELANY,
Attorney for Defendant-Respondent.

26¼ *Court of Appeals.*

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the city of Albany, on the 1st day of February, in the year of our Lord one thousand nine hundred and seven, before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, presiding.
W. H. SHANKLAND, *Clerk.*

Remittitur, February 2nd, 1907.

26½ TIMOTHY F. PADDELL, Appellant,
against
THE CITY OF NEW YORK, Respondent.

Be it remembered, that on the 8th day of September in the year of our Lord one thousand nine hundred and six, Timothy F. Paddell the appellant in this action, came here into the Court of Appeals, by Keith and Abbot his attorneys and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The City of New York the respondent in said action, afterwards appeared in said Court of Appeals by John J. Delany, Corporation Counsel, its attorney.

Which said Notice of Appeal and the return thereto files as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Everett V. Abbot of counsel for the appellant, and by Mr. George S. Coleman of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

26¾ And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

(Sgd.) W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office, Albany, February 2nd, 1907.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] (Sgd.) W. H. SHANKLAND, *Clerk.*

27 At a Special Term, Part II, of the Supreme Court, held in and for the County of New York, at the County Court House in said county, on the 13th day of February, 1907.

Present: Hon. Samuel Greenbaum, Justice.

TIMOTHY F. PADDELL, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the judgment entered upon the Appellate Division order herein and filed in the office of the Clerk of the County of New York, on or about the 26th day of July, 1906, affirming the judgment herein entered in the Office of the Clerk of said Court on or about the 10th day of May, 1906, sustaining defendant's demurrer to the complaint herein and dismissing the complaint with costs and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed with costs and having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court there to be proceeded upon according to law,

28 Now, upon reading and filing the said remittitur and on motion of William B. Ellison, Corporation Counsel, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter,

S. G., *J. S. C.*

28½ [Endorsed:] New York Supreme Court, County of New York. Timothy F. Paddell, Plaintiff-Appellant, against The City of New York, Defendant-Resp'd't. (Copy.) Order and Notice of Entry. E. William B. Ellison, Corporation Counsel, No. 2 Tryon Row, Borough of Manhattan, New York City. Rec'd Feb. 14/07. Adm. E. P. A. To Keith & Abbot, Esq-., Attorney- for Relator.

[Endorsed:] Please take notice that an Order, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York. New York, Feb. 13th, 1907. Yours, etc., William B. Ellison, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. To Keith & Abbot, Esq-., Attorney- for Relator.

29 Supreme Court, New York County.

TIMOTHY F. PADDELL, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the judgment entered upon the Appellate Division order and filed in the office of the Clerk of the County of New York on or about the 26th day of July, 1906, affirming the judgment herein entered in the Office of the Clerk of the said Court on or about the 10th day of May, 1906, sustaining the defendant's demurrer to the complaint herein and dismissing the complaint with costs and the said appeal having been duly argued at the Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed with costs and an order having been duly entered in the office of the Clerk of the County of New York on the 13th day of February, 1907, making the order and judgment of the Court of Appeals the order and judgment of this Court, and the costs of the defendant having been duly taxed at the sum of $103.05.

Now upon motion of William B. Ellison, Corporation
30 Counsel, it is

Adjudged that the said judgment so appealed from as aforesaid be and the same hereby is affirmed, and it is further

Adjudged that the above named defendant The City of New York recover of the above-named plaintiff Timothy F. Paddell, the sum of $103.05, the amount of its costs as taxed and that it have execution therefor.

Dated, New York, February 21st, 1907.

PETER J. DOOLING, *Clerk.*

30½ [Endorsed:] New York Supreme Court, County of New York. Timothy F. Paddell, Pl'ff-App., against The City of New York, Def.-Resp. Copy of Judgment and Notice of Entry. William B. Ellison, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. To Keith & Abbot, Esq-., Attorney-for Pl'ff.

[Endorsed:] Please take notice that a Judgment, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York. New York, Feb. 21st, 1907. Yours, etc., William B. Ellison, Corporation Counsel, Hall of Records, Borough of Manhattan, the City of New York. To Keith & Abbot, Esq-., Attorney- for Pl'ff-App.

31 233,955.

Know all men by these presents, that we, Timothy F. Paddell, of the City, County and State of New York, as principal, and American Surety Company of New York, of 100 Broadway, New York City, New York, as surety, are held and firmly bound unto The City of New York in the full and just sum of Two Hundred and Fifty Dollars to be paid to the said The City of New York, its successors and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of March, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a term of the Supreme Court of the State of New York in a suit pending in said Court, between Timothy F. Paddell, plaintiff and The City of New York, defendant, a final judgment was rendered against the said plaintiff and in favor of the said defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City of New York citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Timothy F. Paddell shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

TIMOTHY F. PADDELL. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK,
By L. E. CARMAN, *Vice-President.*

Attest:
CORTLANDT S. VAN RENSSELAER,
Attorney.

Sealed and delivered in presence of—
LILLIAN MANCHER.

Approved by
OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

THOMAS J. SAVAGE,
LOUIS PAPEN,
[L. S.] *As to American Surety Co.*

COUNTY OF NEW YORK, *ss:*

On this 2nd day of March, 1907, before me personally came and appeared, Timothy F. Paddell, to me known and known to me to be

the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[L. S.] LILLIAN MAUCHER,
Notary Public, New York County.

32 STATE AND COUNTY OF NEW YORK, *ss:*

On this 1st day of March 1907, before me personally appeared L. E. Carman, Vice President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in Nutley, N. J. that he is the Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knew the corporate seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said L. E. Carman, further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the Attorneys of said Corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said L. E. Carman, Vice President.

[L. S.] MARSHALL L. BROWER,
Notary Public, New York County.

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted and is still in force:

"Resolved, That the President and Vice-Presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the Secretary, one of the Assistant Secretaries or one of the Attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer Attorney of the American Surety Company of New York, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company at the City of New York, this 1st day of March, 1907.

[L. S.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

33 [Endorsed:] The within bond is approved as to form and sufficiency of Surety New York M'ch the 4th, 1907. William B. Ellison Corporation Counsel attorney for Defendant in Error.

34 In the Supreme Court of the United States.

TIMOTHY F. PADDELL, Plaintiff in Error,
against
THE CITY OF NEW YORK, Defendant in Error.

Now comes Timothy F. Paddell, plaintiff-in-error above-named, by Everett V. Abbot, his attorney, and says that on the 1st day of February, 1907, the Court of Appeals in a certain cause therein pending, made and entered a final order and judgment in favor of The City of New York, defendant-in-error above-named, and against Timothy F. Paddell, plaintiff-in-error above-named, and afterwards, and on the 21st day of February, 1907, the records and proceedings in the said cause having been remitted to the Supreme Court of the State of New York in and for the County of New York, said final order and judgment of the said Court of Appeals were, pursuant to the statute in such cases made and provided, made and entered as the final order and judgment of the said Supreme Court, in which final order and judgment and in the proceedings had prior thereunto in the said cause, certain errors were committed to the prejudice of the plaintiff-in-error above-named, all of which will in more detail appear from the assignment of errors which is filed with this petition.

35 The said Court of Appeals of the State of New York is the highest court in which a decision in the said cause could be had.

Wherefore your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of the State of New York for the correction of the errors and reversal of the judgment so complained of; that a transcript of the record, proceedings and papers in the said cause duly authenticated, may be sent to the said Supreme Court of the United States; and that upon a final hearing thereof the said error be corrected, and such other and further proceedings be had as according to law should be done.

Dated February 23d, 1907.

EVERETT V. ABBOT,
Attorney for Petitioner,
45 Cedar St., New York City, Borough of Manhattan.

36 [Endorsed:] In the Supreme Court of the United States. Timothy F. Paddell, Plaintiff-in-error, against The City of New York, Defendant-in-error. Petition for Writ of Error. Everett V. Abbot, Attorney for Petitioner, 45 Cedar Street, New York City. Due service of a copy of the within petition is hereby admitted. Dated, New York, March 8, 1907. William B. Ellison, Corporation Counsel, Attorney for defendant in error.

37 In the Supreme Court of the United States.

TIMOTHY F. PADDELL, Plaintiff in Error,
against
THE CITY OF NEW YORK, Defendant in Error.

Now comes Timothy F. Paddell, Plaintiff-in-error above-named, by Everett V. Abbott, his attorney, and in connection with the petition for a writ of error filed herewith, says that in the record and proceedings in the cause therein mentioned and described and in the final order and judgment made and entered therein on the 13th day of February, 1907, by the Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:

I.

Error in holding that the laws of the State of New York authorizing the lien to be established upon the property of the plaintiff-in-error and the personal liability to be laid upon him by the defendant-in-error were not repugnant to Article XIV, §1, amending the Constitution of the United States, although the State of New York thereby authorizes and enables the defendant-in-error to im-

38 pose taxes upon its citizens by means of oaths which are false in fact in that an assessment of property at its full valuation without deducting or allowing for any mortgage-debt, secured thereby, together with an assessment of the mortgage-debt at full valuation as another and simultaneously existing property, involves a declaration under oath by the taxing officers that there is more property in existence than actually exists, and thus authorizes and enables property to be taken without due process of law.

II.

Error in holding that the laws of the State of New York authorizing the lien to be established upon the property of the plaintiff-in-error and the personal liability to be laid upon him by the defendant-in-error were repugnant to Article XIV, (1), although the State of New York thereby authorizes and enables the defendant to tax some of its citizens on more property than they possess, while others of its citizens are not so taxed, and thus denies to the former the equal protection of the laws.

Dated February 23d, 1907.

EVERETT V. ABBOT,
Attorney for Plaintiff in Error,
45 Cedar St., N. Y. City, Borough of Manhattan.

39 [Endorsed:] In the Supreme Court of the United States. Timothy F. Paddell, Plaintiff-in-error, against The City of New York, Defendant-in-error. Assignment of Errors. Everett V. Abbot, Attorney for Plaintiff-in-error, 45 Cedar Street, New York City. Due service of a copy of the within assignment of errors is hereby admitted. Dated, New York, Mar. 8, 1907. William B. Ellison, Corporation Counsel, Attorney for defendant in error.

40 UNITED STATES OF AMERICA, *ss:*

To the City of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York wherein Timothy F. Paddell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this 6th day of March, in the year of our Lord one thousand nine hundred and seven.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

41 [Endorsed:] Due service of the within citation is hereby admitted. Dated New York, Mar. 8, 1907. William S. Ellison, Corporation Counsel, Attorney for defendant in error.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of New York in and for the County of New York, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New York in and for the County of New York before you, or some of you, upon remittitur from the Court of Appeals of the State of New York being the highest court of law or equity of the said state in which a decision could be had in the said suit between Timothy F. Paddell, plaintiff, and The City of New York, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-

struction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption especially set up or claimed under such clause of the said Constitution, treaty,
43 statute, or commission; a manifest error hath happened to the great damage of the said Timothy F. Paddell, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of March, in the year of our Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
OLIVER WENDELL HOLMES,
Justice Supreme Court.

44 [Endorsed:] In the Supreme Court of the United States. Timothy F. Paddell, Plaintiff-in-error, against The City of New York, Defendant-in-error. Writ of Error. Keith & Abbot, Attorneys for Plaintiff-in-error, 45 Cedar Street, New York City. Rec'd Mch. 9, 1907. Due service of a copy of the within writ of error is hereby admitted. Dated, New York, Mar. 8, 1907. William B. Ellison, Corporation Counsel, Attorney for defendant in error.

45 STATE OF NEW YORK, *County of New York, ss:*

Office of the Clerk of the Supreme Court of the State of New York in and for the County of New York.

I, Peter J. Dooling, Clerk of the County of New York and of the Supreme Court of the State of New York in and for the said County of New York by virtue of the annexed writ of error which was served upon me on the 9th day of March, 1907, and in obedience thereto do hereby certify that the foregoing pages numbered from 1 to 32 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the suit mentioned in the said writ of error as the same remain of record and on file in my office, and that annexed hereto is the petition for the said writ of error, the as-

signment of errors thereon, the bond upon said writ of error, the citation to the writ of error with proof of service of the same, and the said writ of error so served upon me as aforesaid.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at my office in the City and County of New York on the 12th day of March, 1907.

[Seal New York.]

PETER J. DOOLING, *Clerk.*

[Endorsed:] Supreme Court, County of New York. Timothy F. Paddell, Plaintiff-in-error, *vs.* The City of New York, Defendant-in-error. Writ of error and return. Everett V. Abbot, Attorney for Plaintiff, 45 Cedar Street, New York City.

Endorsed on cover: File No. 20,617. New York supreme court. Term No. 652. Timothy F. Paddell, plaintiff in error, *vs.* The City of New York. Filed March 14th, 1907. File No. 20,617.

EVENING POST JOB PRINTING OFFICE, NEW YORK

Office Supreme Court, U. S.
FILED.
MAR 21 1907
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States,

TIMOTHY F. PADDELL,
Plaintiff in Error,

AGAINST

THE CITY OF NEW YORK,
Defendant in Error.

42.
~~257.~~
No. ~~632.~~

Now comes Timothy F. Paddell, plaintiff in error in this cause, and moves the Court that this cause be advanced on the docket and set down for hearing upon a day certain, upon the ground of the following special and peculiar circumstances:

The plaintiff in error has been assessed by the defendant in error for both City and State taxes upon the full value of certain real property situated in the State of New York, and owned by him, without, however, receiving any deduction or allowance on account of two certain mortgages now liens thereon. The plaintiff in error alleges, among other things, that such a method of assessment involves a fiction in taxation in that the municipality by assessing the land at its full value and also by assessing the mortgage to be satisfied out of it at its full value has enabled the municipality to assess its citizens

for more property than actually exists, and to assess some of its citizens for more property than they own, and he alleges that this method of taxation is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it takes property without due process of law, and denies the equal protection of the laws.

The question involved upon this writ of error is important, inasmuch as the decision of it will affect the collection of state, county and municipal taxes not only in the City and State of New York, but throughout the country.

Moreover, by reason of certain special and peculiar circumstances involving the present situation with reference to taxation in the State of New York, it is extremely important to that State and its municipalities that this question should receive an early decision.

The assessment here in question was fixed and this action was brought in February, 1906. Subsequently thereto a statute was enacted by the Legislature of the State of New York, and approved by the then Governor, providing that all mortgages recorded after the 1st day of July, 1906, should be exempt from all State, county and municipal taxation, except for a recording fee of one-half of one per centum of the amount of the mortgage. The enactment of such an exemption does not, however, affect the constitutional rights of the mortgagor; and if the decision on this writ of error be to the effect that this assessment is unconstitutional and that the mortgagor is constitutionally entitled to have it reduced by the amount of the mortgage, he will still have that right, even though the mortgage itself be recorded and thereafter exempted under the new law.

Under these circumstances, if the plaintiff in error shall prevail upon this writ, a very serious and complicated situation will arise in the State of New York. The assessed valua-

tion of land on all tax rolls throughout the State will become subject to serious diminution, *first*, by mortgagors seeking an allowance on account of their mortgages, and *second*, by mortgagees claiming that their mortgages are exempt, while at the same time there is a provision in the State Constitution which forbids any county or city to become indebted to an amount which shall exceed ten per centum of the assessed valuation of its land. Consequently, if the plaintiff in error shall prevail, many counties and cities will find themselves seriously embarrassed in their financial transactions, since the margin of their debt limit, that is, the difference between the amount of their indebtedness and ten per centum of the assessed valuation of their land, will be greatly impaired or even altogether destroyed, and therefore they will be in immediate and urgent need of remedial legislation. This embarrassment will be serious in any event; but the longer it is delayed, the more serious it will become, for the number of exempt mortgages is rapidly growing, and the effect of their exemption is becoming more and more difficult to overcome.

There are further special and peculiar circumstances which render an early decision important.

The statute exempting mortgages was enacted as the result of a considerable popular discussion, ranging over a period of years, the effect of which was in no small degree to leave both borrowers and lenders in a position of uncertainty as to what the law would be, and therefore in a state of uncertainty as to the basis upon which mortgage loans should be made. This unsettled condition, which very widely hampered building operations throughout the State, has not yet entirely abated, and it is most important that any further changes, if they are to come at all, should come now rather than after property interests have grown accustomed to the present situation.

Although the questions of law involved are im-

portant, they are extremely simple, and the argument of them will hardly require more than the allowance of time prescribed by the rules.

March 18, 1907.

SIR:

On the 25th day of March, 1907, or as soon thereafter as counsel can in that behalf be heard, we shall move the Court that the foregoing rule be granted.

Yours, &c.,

EVERETT V. ABBOT,
Attorney for Plaintiff in Error.

To WILLIAM B. ELLISON, Esq.,
Corporation Counsel,
Attorney for Defendant in Error.

For and on behalf of the defendant in error, the City of New York, I hereby join and unite in the request that the rule to be moved for as above be granted.

March 18, 1907.

WILLIAM B. ELLISON,
Corporation Counsel,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

TIMOTHY F. PADDELL,
Plaintiff in Error,

AGAINST

THE CITY OF NEW YORK,
Defendant in Error.

Memorandum for Plaintiff in error upon motion to advance.

The fiction involved in the assessment here under review may be briefly illustrated by the following simple case:

A owns $40,000 in cash; B owns $100,000 in land; the two together own $140,000. A buys the land and gives in exchange his cash, $40,000, and his bond, secured by a first mortgage, for $60,000. No new values have been created; but under these circumstances the parties are taxed as follows:

A is taxed on the land.....	$100,000
B is taxed on the cash.....	40,000
B is also taxed on the bond.....	60,000
Total.....	$200,000

By this assessment, therefore, the municipality asserts that $140,000 worth of property should pay taxes as though it were $200,000.

Under this writ of error the question is squarely presented whether such a method of taxation is taxation by due process of law.

It is inconceivable that such a question can be answered otherwise than in the negative.

If, however, it be answered in the negative, then, for the reasons stated in the motion, it is of the most vital importance that the answer should be given at the earliest practicable moment.

We submit that the motion should be granted.

EVERETT V. ABBOT,
Attorney for Plaintiff in Error.

IN THE

1

Supreme Court of the United States.

TIMOTHY F. PADDELL,
Plaintiff in Error,

AGAINST

THE CITY OF NEW YORK,
Defendant in Error.

No. 42.

2

Now comes Timothy F. Paddell, plaintiff in error in this cause, and moves the Court that this cause be advanced on the docket and set down for hearing upon a day certain, upon the ground of the following special and peculiar circumstances:

The plaintiff in error has been assessed by the defendant in error for both City and State taxes upon the full value of certain real property situated in the State of New York, and owned by him, without, however, receiving any deduction or allowance on account of two certain mortgages now liens thereon. The plaintiff in error alleges, among other things, that such a method of assessment involves 3
a fiction in taxation in that the municipality by assessing the land at its full value and also by assessing the mortgage to be satisfied out of it at its full value has enabled the municipality to assess its citizens for more property than actually exists, and to assess some of its citizens for more property than they own, and he alleges that this method of

taxation is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it takes property without due process of law, and denies the equal protection of the laws.

The question involved upon this writ of error is important, inasmuch as the decision of it will affect the collection of State, county and municipal taxes not only in the City and State of New York, but throughout the country.

Moreover, by reason of certain special and peculiar circumstances involving the present situation with reference to taxation in the State of New York, it is extremely important to that State and its municipalities that this question should receive an early decision.

The assessment here in question was fixed and this action was brought in February, 1906. Subsequently thereto a statute was enacted by the Legislature of the State of New York, and approved by the then Governor, providing that all mortgages recorded after the 1st day of July, 1906, should be exempt from all State, county and municipal taxation, except for a recording fee of one-half of one per centum of the amount of the mortgage. The enactment of such an exemption does not, however, affect the constitutional rights of the mortgagor; and if the decision on this writ of error be to the effect that this assessment is unconstitutional and that the mortgagor is constitutionally entitled to have it reduced by the amount of the mortgage, he will still have that right, even though the mortgage itself be recorded and thereafter exempted under the new law.

Under these circumstances, if the plaintiff in error shall prevail upon this writ, a very serious and complicated situation will arise in the State of New York. The assessed valuation of land on all tax rolls throughout the State will become subject to serious diminution, *first*, by mortgagors seek-

ing an allowance on account of their mortgages, 7
and *second*, by mortgagees claiming that their mortgages are exempt, while at the same time there is a provision in the State Constitution which forbids any county or city to become indebted to an amount which shall exceed ten per centum of the assessed valuation of its land. Consequently, if the plaintiff in error shall prevail, many counties and cities will find themselves seriously embarrassed in their financial transactions, since the margin of their debt limit, that is, the difference between the amount of their indebtedness and ten per centum of the assessed valuation of their land, will be greatly impaired or even altogether de- 8
stroyed, and therefore they will be in immediate and urgent need of remedial legislation. This embarrassment will be serious in any event; but the longer it is delayed, the more serious it will become, for the number of exempt mortgages is rapidly growing, and the effect of their exemption is becoming more and more difficult to overcome.

There are further special and peculiar circumstances which render an early decision important.

The statute exempting mortgages was enacted as the result of a considerable popular discussion, ranging over a period of years, the effect of which was in no small degree to leave both borrowers and 9
lenders in a position of uncertainty as to what the law would be, and, therefore, in a state of uncertainty as to the basis upon which mortgage loans should be made. This unsettled condition, which very widely hampered building operations throughout the State, has not yet entirely abated, and it is most important that any further changes, if they are to come at all, should come now rather than after property interests have grown accustomed to the present situation.

Although the questions of law involved are important, they are extremely simple, and the argu-

10 ment of them will hardly require more than the allowance of time prescribed by the rules.

A motion to advance was made in this cause returnable on the 25th day of March, 1907, upon the foregoing statement. The motion was subsequently denied without prejudice. Pursuant to the leave thus reserved, the motion is hereby renewed, and the following additional facts are submitted as grounds for granting the motion so renewed:

In the City of New York, the day when the assessments for the purposes of taxation are made public and when for the first time the taxpayers are enabled to file protests against their assessments,
11 is the second Monday of January. Consequently, on the 13th day of January, 1908, it will be possible for the taxpayers of the City of New York to protest against their assessments for that year, and particularly for the owners of land subject to mortgage to ask for the reduction of their assessments by their mortgage indebtedness. If, therefore, the plaintiff in error should be successful in the prosecution of his writ and the City of New York is to be afforded an opportunity to protect itself against the effects of such a decision, the decision should be rendered as long before that time as possible. In most of the other counties and municipalities of
12 the State the time for filing protests is later than the second Monday of January, but, nevertheless, the reason for an early decision is still applicable and the next two or three months comprise the period within which such a decision could be rendered with the least possible disturbance of existing conditions.

SIR:

On the 14th day of October, 1907, or as soon thereafter as counsel can in that behalf be heard,

we shall move the Court that the foregoing rule be granted. 13

Yours, &c.,
EVERETT V. ABBOT,
Attorney for Plaintiff in Error.

To FRANCIS K. PENDLETON, Esq.,
Corporation Counsel,
Attorney for Defendant in Error.

For and on behalf of the defendant in error, the City of New York, I hereby join and unite in the request that the rule to be moved for as above be granted.

September 26, 1907. 14

FRANCIS K. PENDLETON,
Corporation Counsel,
Attorney for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

TIMOTHY F. PADDELL,
Plaintiff in Error,

AGAINST 15

THE CITY OF NEW YORK,
Defendant in Error.

Memorandum for Plaintiff in Error upon Motion to Advance.

The fiction involved in the assessment here under review may be briefly illustrated by the following simple case:

16 A owns $40,000 in cash; B ownes $100,000 in land; the two together own $140,000. A buys the land and gives in exchange his cash, $40,000, and his bond, secured by a first mortgage, for $60,000. No new values have been created; but under these circumstances the parties are taxed as follows:

A is taxed on the land....	$100,000
B is taxed on the cash	40,000
B is also taxed on the bond.	60,000
Total	$200,000

By this assessment, therefore, the municipality
17 compels $140,000 worth of property to pay taxes as though it were $200,000.

Under this writ of error the question is presented whether such a method of taxation is taxation by due process of law.

It is inconceivable that such a question can be answered otherwise than in the negative.

If, however, it be answered in the negative, then, for the reasons stated in the motion, it is of the most vital importance that the answer should be given at the earliest practicable moment.

We submit that the motion should be granted.

EVERETT V. ABBOT,
18 Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
SEP 16 1907
JAMES H. McKENNEY,
CLERK

No. 42.

IN THE

SUPREME COURT of the UNITED STATES

ON WRIT OF ERROR TO THE
SUPREME COURT OF THE STATE OF NEW YORK.

TIMOTHY F. PADDELL, *Plaintiff in Error,*

against

THE CITY OF NEW YORK, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR

EVERETT V. ABBOT,
Of Counsel for Plaintiff in Error.

CRIST, SCOTT & PARSHALL, Cooperstown, N. Y., New York Office, 220 Broadway.

IN THE

United States Supreme Court.

TIMOTHY F. PADDELL,
Plaintiff in error,

against

THE CITY OF NEW YORK,
Defendant in error.

Writ of error to the Supreme Court of the State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

This writ of error brings up for review a judgment of the Supreme Court of the State of New York, in and for the County of New York, entered upon a remittitur of the Court of Appeals of the State of New York, the highest court in which a decision could be had in this cause.

Writ of Error, p. 19.

STATEMENT OF FACTS.

The complaint is in the form of a bill to restrain the creation of a cloud upon title. Its purpose is to secure an injunction against creating a lien for taxes to be levied and collected from

the plaintiff as the alleged owner of property which in fact and in law he does not own. The facts which it alleges are these:

The plaintiff is the owner, subject to two certain mortgages, of premises in the City of New York, known as Nos. 592, 594 and 596 Seventh avenue, in the Borough of Manhattan. They are assessed with respect to the taxes for the year 1906 at the sum of $160,000. The mortgages, one being for $70,000 and the other for $45,000, amount to $115,000.

Complaint, Paragraph II, p. 2.

The plaintiff alleges that the assessment of $160,000 has been made without any deduction of the mortgages and that although he applied for such a deduction at the time and in the manner prescribed by law, the board of taxes and assessments, having jurisdiction in that behalf, refused, and still refuses, to make it.

Complaint, Paragraph III, subdivisions 2-5, p. 3.

The complaint then sets forth certain proceedings which will be had by the officers of the defendant and by which, in consequence of the refusal of the board of taxes and assessments, the assessment of $160,000 will be confirmed and will create, not only a personal liability of the plaintiff, but also a lien on the land.

Complaint, Paragraph III, subdivision 6, pp. 3-4.

It also alleges that the lien upon his property and the personal liability so to be imposed upon him are in violation of the laws of the State of New York, and that if they are in fact authorized by any law, then any such law is repugnant to the Constitution of the State of New York and to the Constitution of the United States.

Complaint, Paragraph V, p. 5.

Concluding with the usual allegations that the plaintiff is without adequate remedy at law in the premises,

Complaint, Paragraph VI, pp. 5-6,

the complaint prays judgment that the defendant and its officers be restrained from creating a lien for taxes upon the property of the plaintiff *in excess of a tax upon his equity.*

See prayer of the complaint, p. 6.

If the prayer of the complaint is granted, the plaintiff will be taxed for his equity in the land and will not be taxed for the mortgaged interest.

The complaint alleges that the plaintiff has not been assessed for the year 1906 with respect to any personal estate, and consequently there is no question here of any deduction having been allowed on account of his indebtedness on the bonds secured by the mortgages.

Complaint, Paragraph IV, p. 4.

To this complaint the defendant in error interposed a demurrer upon the ground that the complaint did not state a cause of action.

Demurrer, p. 7.

Final judgment sustaining the demurrer and dismissing the complaint with costs was entered in the Supreme Court (Judgment, p. 8), affirmed by the Appellate Division (Order of Affirmance, pp. 11-12), and by the Court of Appeals (Remittitur, pp. 14-15).

An opinion was rendered by Mr. Justice Blanchard, before whom the cause was heard in the first instance (Opinion, pp. 9-11); but no opinion was rendered by the Appellate Division or by the Court of Appeals.

ASSIGNMENT OF ERRORS.

The plaintiff in error alleges error in the judgment here under review as follows:

I

Error in holding that the laws of the State of New York authorizing the lien to be established upon the property of the plaintiff-in-error and the personal liability to be laid upon him by the defendant-in-error were not repugnant to Article XIV, §1, amending the Constitution of the United States, although the State of New York thereby authorizes and enables the defendant-in-error to impose taxes upon its citizens by means of oaths which are false in fact in that an assessment of property at its full valuation without deducting or allowing for any mortgage-debt secured thereby, together with an assessment of the mortgage-debt at its full valuation as another and simultaneously existing property, involves a declaration under oath by the taxing officers that there is more property in existence than actually exists, and thus authorizes and enables property to be taken without due process of law.

II

Error in holding that the laws of the State of New York authorizing the lien to be established upon the property of the plaintiff-in-error and the personal liability to be laid upon him by the defendant-in-error were not repugnant to Article XIV, §1, although the State of New York thereby authorizes and enables the defendant to tax some of its citizens on more property than they possess, while others of its citizens are not so taxed, and thus denies to the former the equal protection of the laws.

ARGUMENT.

I

Taxation by Fiction is Unconstitutional.

This question is presented by the first assignment of error.

I.

The Fiction Stated.

That the general property tax, as customarily administered in our American commonwealths, involves the assessment and taxation of fictitious values, that is of alleged values which demonstrably have no existence whatever, is a proposition not capable of dispute: it has been known and recognized for years. Thus, Judge Cooley, writing in 1886, says:

> "There is also sometimes what seems to "be a double taxation of the same property "to two individuals; as where the pur- "chaser of property on credit is taxed on "its full value, while the seller is taxed to "the same amount on the debt. How this "would operate may be readily perceived "by supposing the extreme case that *all* "the property in a town is sold on credit, "in which case, if the property is taxed to "the purchasers, and the debts to sellers, "it is manifest that the town taxes twice as "much wealth as lies within its borders."
>
> Cooley on Taxation (1 ed.) 159-60
> Same (2 ed.) vol. 1, p. 220.
> Same (3 ed.) vol. 1, p. 387.
> See also Seligman: Essays on Taxation (1st ed.) 101 (1895).
> Wells: Theory and Practice of Taxation, 474-7 (1900).

In spite of the fact that these fictions have been

so long recognized, they have never been well understood. For example, when Professor Seligman attempts to illustrate them in the passage cited, he actually gives a case where there is no fiction at all. In order, therefore, to illustrate what they really are, I shall give two instances of them, one arising out of a mortgage transaction in realty, and one arising out of a precisely similar transaction in personalty.

1. The mortgage of land.

Let it be supposed that A's entire property is free and unincumbered by debts or otherwise, and that it consists of $40,000 in cash. Under these circumstances, A is properly assessed on the personal estate tax rolls as for personalty amounting to $40,000. This is in all respects just, equal, and legal taxation. Let it also be supposed that B's entire property is free and unincumbered by debts or otherwise, and that it consists of land of the real and assessed value of $100,000. Under these circumstances, B is properly assessed on the real estate tax rolls as for realty amounting to $100,000. This, too, is in all respects just, equal, and legal taxation.

The two assessments together aggregate $140,000, and that is the total amount of property which, as between those two, is in existence.

Now, however, let it be supposed that A buys the land from B and gives what is called a purchase-money mortgage to secure the unpaid portion of the purchase price. He pays B $40,000 in cash and gives B his bond conditioned to pay the sum of $60,000, secured by a mortgage, which is a first lien on the land. This transaction has created no new property, either for A or for B, and has merely effected a change in the nature of their original interests. A's cash has been converted into an equity in land, and B's land has been converted into cash and a bond secured by

mortgage. Neither is worth more than he was before, and each is worth as much as he was before. Under our present practice, however, B is now assessed on the personal estate rolls as owning personal estate to the amount of $100,000, consisting of the bond, $60,000, and cash, $40,000, while A is assessed on the real estate rolls as owning real estate to the amount of $100,000.

The two assessments together aggregate $200,000.

Therefore, although the transfer has effected no increase of value whatever, there is now on the assessment rolls an assessed valuation of $200,000 where there is only $140,000 worth of property in existence.

For the purpose of emphasizing the facts, let us compare the two assessments in tabular statements:

ASSESSMENT BEFORE THE SALE.

A owns, and is assessed for, property free and clear, in the form of cash	$40,000
B owns, and is assessed for, property free and clear, in the form of land	100,000
Total taxable property	$140,000

ASSESSMENT AFTER THE SALE.

A is now assessed for land		$100,000
B is now assessed for—		
Cash	$40,000	
Bond	60,000	100,000
Total assessment		$200,000
Total taxable property		140,000
Fictitious excess		$60,000

2. The mortgage of personalty.

Let us assume a mortgage transaction in personal property identical in its figures and its essential effect with that which we have already assumed in the case of land: A, having $40,000 in cash, purchases from B certain tangible personal property, for example, a stock of goods, of the real and assessed value of $100,000 giving in return his cash, $40,000, and his note for $60,000, secured by a chattel mortgage on the property purchased. How are the parties to this transaction to be taxed?

It is clear that B is to be taxed on $40,000 cash and $60,000, the note. But how about the tangible personal property? In answering this question, we must remember that a chattel mortgage differs both from a pledge and from a mortgage of land in that it carries title to the mortgagee.

Am. & Eng. Enc. of Law (2 ed.) tit. *Chattel Mortgages.*

Stearns v. *Oberle*, 47 Misc., 349.

Cutler v. *James Goold Co.*, 43 Hun, 516.

Consequently under this state of the law, the stock of goods must be assessed to B, and not to A, as the owner. A, however, has an intangible right against B, his equity of redemption, and it is a right to have the title to $100,000 worth of goods transferred to him upon paying $60,000 in cash. In other words he has an intangible right worth $40,000. The final result, therefore, is to tax the mortgagee on $200,000, that is to say, both on the property purchased and on the price of it, and to tax the mortgagor on the equity in the same property.

To make the point absolutely clear and unmistakable, we give it in the following tabular statement:

ASSESSMENT BEFORE THE SALE.

A owns, and is assessed for, property, free and clear, in the form of cash	$40,000
B owns, and is assessed for, property, free and clear, in the form of stock of goods	$100,000
Total taxable property	$140,000

ASSESSMENT AFTER THE SALE.

A is now assessed for		
Value of the goods	$100,000	
Less amount of note	60,000	$40,000
B is now assessed for		
Cash	$40,000	
Note	60,000	
Stock of goods	100,000	200,000
Total assessment		$240,000
Total taxable property		140,000
Fictitious excess		$100,000

It is not to be supposed that a fiction is involved in every mortgage transaction. Quite the contrary is the case. For example, suppose that A's entire property consists of land, free and clear, worth $100,000 and that B's entire property consists of cash to the amount of $60,000. The two together own $160,000 of property and that is all they do own. Now if A borrows B's cash and secures the loan by executing and delivering his bond and mortgage, A would be assessed on $100,000 worth of land and $60,000 worth of cash, but he would be allowed to deduct his debt of $60,000. The net result would, therefore, be that A would still be taxed on $100,000, and B would

be taxed on $60,000 and there would be no excess of fictitious value to be the subject of any taxation. If, however, the law were that debts could not be deducted, then A would be taxed on $160,000 worth of property, land and cash, and B would be taxed on $60,000 worth of property, the bond, and the two together would be taxed on $220,000 worth of property, or on a fictitious excess of $60,000.

In other words, the fiction disappears whenever a deduction is allowed, just to the extent, at any rate, of the amount of the deduction; but when the deduction is not allowed then the fiction is indubitably established. It was for that reason that the plaintiff-in-error alleged in his complaint that he was not assessed for any personal property.

Complaint, Paragraph IV, p. 4.

By that allegation it appeared that he had no opportunity to deduct his bonded indebtedness and was therefore the victim of taxation upon fictitious values. For the same reason in any supposed case which may be used for illustrative purposes, it is always necessary to state all the property involved and all the possibilities of deduction and offset. Only so can the fiction be made apparent, and only so can it be accurately analyzed.

* * * * * * *

Such, then, is the fiction employed in the customary methods of administering our general property tax. That it results in the assessment and taxation of values that do not exist, that it results in the taking of property by means of an official oath which is false in fact, are propositions which are not capable of rational dispute, and have not even been made the subject of *irrational* dispute, but, on the contrary, have been made the burden of the chief criticism of the

tax. That this fiction has never been made the subject of judicial decision, that bench and bar alike have been content to accept it as a necessary evil, is a terribly severe indictment of our so-called modern jurisprudence and of our conceptions of legal justice. That citizens of this country, under a constitution which guarantees them due process of law and the equal protection of the laws, are annually deprived of their property and compelled to bear grossly unequal portions of the expense of maintaining the government because of a fiction, because of an official oath which is false in fact, is little less than shameful. It is not too much to say, therefore, that upon the decision of this cause depend issues immeasurably more important than the money, or even than the methods of taxation, here involved: upon it also depends the great question of the adequacy of our jurisprudence itself and of its capacity to rise superior to inherited fictions and to establish justice upon the fundamental principle of truth.

* * * * * * *

The fiction involved in the general property tax as actually administered arises, in the last analysis, from this belief: that intangible rights, or *choses in action*, which by their terms must be satisfied by the transfer of tangible property, as, for example, by the payment of money, can have a value extrinsic to, and independent of, the tangible property which must be transferred in satisfaction of them. To understand this, we must distinguish here between two great classes of rights. There is one class, such as patent-rights, franchises, rights of goodwill, contracts for personal service, and so forth, which have a real value of their own. They are entirely independent of any question of tangible property, and are quite capable of independent valuation

and assessment. There is another class, however, composed of all the modern forms of credit, such as checks, bonds, shares of stock, promissory notes and other *choses in action,* which have no such independent value. These, by their very terms, require the transfer of tangible property in performance of the obligation which they evidence, and if it were possible at a given instant to liquidate all existing rights of this character, the property of the people (outside of the franchise and other rights just mentioned) would at that instant be reduced to nothing but the tangible property, land and chattels, then in being.

Now to assess the owner of such an intangible right, that is, a creditor, on his right, and to assess the obligor under that right, that is, the debtor, on the tangible property which he owns, including that which he must transfer in satisfaction of the right, is by necessary and inevitable consequence to assess more values than exist. To assess the owner of the bond, in our illustrative case of the real estate mortgage, on the bond, and the owner of the land on the land, which is the sole fund out of which the owner of the bond can obtain satisfaction in case of default, or to assess the owner of the note, in our illustrative case of the personal estate mortgage, on the note and the owner of the stock of goods on the goods, which again are the only fund out of which the owner of the note can obtain satisfaction in case of default, is to assess values which are purely fictitious.

No possible legal theories will avoid this consequence. It is not avoided, for example, by the legal theory that the land is assessed *in integrum,* or, as it were, *in rem,* "regardless of ownership or terms of ownership."

Record, Opinion of Blanchard, J., p. 10.

This is the objection which springs first to the

lips of every lawyer—of him, at any rate, who has been nurtured in the mysterious jurisprudence of the State of New York. It is phrased in as many different modes of expression as there are lawyers to phrase it; but in the end it embodies only the one theory, that the bond must be assessed independently of the land because it belongs to the creditor, while the land is to be assessed independently of the bond because it belongs to the debtor. This theory, as applied to the taxation of mortgaged lands, is fundamentally erroneous, as we shall subsequently show, because its assumed premises are untrue; but even on the supposition that it is sound, it does not meet the situation. On the contrary, it dodges the issue: it does not in the slightest degree avoid, or tend to avoid, the brute fact that properties which are worth only $140,000 can be made, and are made, to pay taxes as if they were worth $200,000 upon a false official oath that they are actually worth that sum.

That the fiction is necessarily and unavoidably involved in the very method of assessment is demonstrated beyond doubt by the fact that the amount of the fiction is always exactly equal to the assessed value of the intangible right. In the case of the mortgage on land, for example, the intangible right is the debt, evidenced by the bond. This intangible right is assessed at $60,000 and that is the exact amount of the fictitious value in the total assessment. In the case of the chattel mortgage, however, there are two intangible rights. The first is the mortgagor's equity of redemption, the right to have $100,000 worth of property transferred to him upon the payment of $60,000. It is a real right *in personam* and is not a title in the property itself. The second is the debt, evidenced by the note. The first is assessed at $40,000 and the second at

$60,000, the two together making the sum of $100,000, which again is the exact amount of the fictitious value in the total assessment. Illustration after illustration might be given of this fiction—the taxation of a corporation on its assets and of the stockholder on his share in those assets, the taxation of debtor and creditor in a state where the deduction of debts is not allowed, the taxation of the owner of land subject to a mortgage when he is not liable on the bond—and in every case, when it is reduced to figures, the fiction will appear, and the computation will show that the fictitious excess will exactly equal the assessed value of the intangible rights. And so we repeat: we cannot escape the fiction by any theory whatsoever, not even by the theory of taxing land *in rem*.

B.

The Constitutionality of Taxation by Fiction.

The proposition that taxation by fiction is constitutional, that a process whereby the state takes the property of its citizens upon an official oath as to values which is false in fact is a due process of law, this is a proposition which is so absurd that it is not capable of intelligent discussion. I shall not discuss it. I shall simply content myself with presenting one or two aspects of it which might not otherwise suggest themselves.

We are not now concerned with the initial steps of judicial procedure, the giving of notice and the opportunity to be heard. The plaintiff-in-error has no ground of complaint on that score: his very pleadings show that he was heard in his own behalf. It is, on the contrary, the judicial process itself with which we are now concerned—the process of rendering judgment upon evi-

dence—and the proposition which we here advance is that when such a process involves error, demonstrable, indubitable error, such as we have witnessed in the assessment now before the Court, it is not and cannot be a due process of law.

Suppose that X were sued for deceit because he falsely represented that A and B owned $200,000 worth of property, and that he endeavored to justify the truth of his representations by showing that A owned land worth $100,000 while B owned cash $40,000 and A's bond, secured by a mortgage on the land for $60,000. Upon such an issue the function of the jury would be precisely equivalent to the function of the assessors: it would be their duty from the evidence before them to assess the property of A and B. Would it, or would it not, be reversible error for the court to charge that in rendering their verdict they must take into consideration the fact that A's bond had a value independent of, and extrinsic to, the land which he owned, and that consequently they would be justified in finding that A and B were worth $200,000?

Let us take another illustration:

The general property tax is a very well defined institution throughout the Union. Its character is not dependent upon precision of phrase or upon uniformity of statutory language. On the contrary each state legislature adopts its own form of enactment, and yet the result is surprisingly uniform. In each state, all the property within the state, whether real or personal, unless particularly exempt by law, is subject to taxation, and the assessors are directed to assess all the property within their several districts at its fair value. Thus the tax rolls are supposed to be a just index of the amount of property in each community. How far our own legislature relies upon them as being such an index is manifested

by the law which it has established for the investment of savings bank funds. In 1902 it enumerated thirty-three different cities, in fifteen different states, whose bonds were made legal investments for savings banks, and then it went on to provide that

> "if at any time the indebtedness of any of "said cities, less its water debt and sinking fund, shall exceed seven per centum "of *its valuation for purposes of taxation,*"

then the bonds should cease to be an authorized method of investment.

Banking Law, Section 16, subdiv. 5.

Now suppose that the public officials of some city enumerated in this statute should, deliberately and for the express purpose of inflating the city credit and thus creating a market for its bonds, assess all the property within the municipal borders on the principle that intangible rights have a value independent of, and extrinsic to, the tangible property which must be transferred in satisfaction of them. The result would be that "its assessed valuation for the purposes of taxation" would be swelled to a fictitious total two or three times as large as the real value. Suppose further that bonds sold under such circumstances were not met at maturity, that the city were unable to pay them, and that a savings bank which had invested in them in good faith should bring action for deceit against the culpable officials. Would it, or would it not, be reversible error for the court to charge the jury that in rendering their verdict they must take into account the fact that rights do have an independent value of their own and that the total assessed valuation of the city was not a fictitious total?

Let us take still a third illustration.

By §910 of the Greater New York Charter, the Board of Aldermen is required to make certain corrections (not now material) in the assessment rolls and then to "add up and set down the aggregate valuations of the real and personal property in the several boroughs." When that is done, they are further required by the same section to "transmit by mail a certificate of such aggregate valuations, *showing separately the aggregate amount of the real and personal property in each borough.*" Now suppose that the Board of Aldermen, having completed their additions, should refuse to transmit the result by mail to the comptroller, upon the ground that owing to the methods of assessment now in use the additions would not show the aggregate amount of real and personal property in the different boroughs, but would show a wholly fictitious and untrue amount. Would mandamus proceedings lie to compel them to perform this purely ministerial function?

In one case of mandamus proceedings, when the object was to compel the assessors to affix their oath to an assessment roll which was in fact untrue, the Court of Appeals decided that the application should be denied saying:

> "Courts do not exist to compel men to "take false oaths and whatever duty the "assessors may have omitted they owe no "duty to the public to commit a crime, and "no public exingency can require it of "them."
>
> *People ex rel., Supervisors v. Fowler,* 55 N. Y. 252, 254.

These three illustrative cases show how absurd is the error and how vital the part that it plays in the assessment process. Yet this error has never before been subjected to judicial scrutiny, and it comes now before this Court in what is in

all respects a case of first impression. The nearest approach to a decision that taxation by fiction is unconstitutional is to be found in cases that relate, not to fiction of fact, but to fiction of law, and in those cases this court has refused to allow the fiction to be employed. Thus the maxim, *mobilia sequuntur personam*, has been declared to be a fiction and not to justify a state in taxing tangible personal property situated outside of its borders.

Union Transit Co., v. *Kentucky*, 199 U. S., 194.

Again, the common law doctrine that the *situs* of a *chose in action* consisting of a specialty, such as a promissory note, is the place where the specialty to be found has been declared to be a fiction and not to prevent a state from taxing the real value at its real *situs*, the home of the debtor.

Metropolitan Life Ins. Co., v. *New Orleans*, 205 U. S., 395.

Such is the holding of this Court as to fiction of law: is there any possible doubt as to its position on the similar question of fiction of fact?

* * * * *

There is, however, a collateral problem involved in this matter of taxation by fiction which it is proper to discuss, both because it is involved in the case and also because the discussion of it will cast a great light upon the essential nature of the fiction itself.

This collateral question is this: *Granted that taxation by fiction is unconstitutional, who is the proper party plaintiff to complain of it?*

If in any case of taxation such as that in the case at bar, we reduce the assessment to figures, we shall find that the burden of the fiction falls on him who owns the tangible property that must be used in satisfying the intangible right.

In the case of the mortgage on land, the land is the fund out of which the bond must be satisfied, and it is the owner of the land, *i. e.*, the mortgagor, who suffers, because his assessment is raised from $40,000 to $100,000: the whole burden of the $60,000 fiction falls upon his shoulders. In the case of the mortgage on personalty, the stock of goods is the fund out of which the note must be satisfied, and it is the owner of the stock of goods, *i. e.*, the mortgagee, who suffers, because his assessment is raised from $100,000 to $200,000: the whole burden of the $100,000 fiction falls upon his shoulders. Such would be the case, too, if in the State of New York a statute were passed restoring the common law effect of a mortgage to transfer the title to the mortgagee. Under such circumstances it would be incumbent on the assessors to tax the land to the mortgagee as the owner instead of as now to the mortgagor, and then the situation would be like that of the mortgage of personal property: the mortgagee would find his assessment raised from $100,000 to $200,000, and the burden of the $100,000 fiction would fall upon *his* shoulders.

It follows from these indisputable analyses that if anybody is entitled to maintain proceedings to avoid taxation by fiction it is the owner of tangible property which is liable to be taken in satisfaction of an intangible right. In the case of the mortgage of land, taxed as the land here in question is taxed, the proceedings must be maintained by the mortgagor.

The plaintiff-in-error, for example, by investing $45,000 in land worth $160,000 and giving his bond and mortgage to pay the remainder of the purchase-price, suddenly finds his assessment raised from $45,000 to $160,000: the burden of the fiction has fallen on his shoulders and he is the one to maintain these proceedings.

Curiously enough, however, there has been a notion prevalent among the profession that in the case of the mortgage on land, at any rate, it is the mortgagee who is entitled to complain of this fiction. There was, for example, in California a very striking series of attempts to determine this question—a series so important that we shall give a brief account of it. The question arose under a constitutional provision requiring *uniformity* of taxation.

In the case of

People v. *McCreery*, 34 *Cal.*, 432,

the *mortgagee* resisted the tax on his mortgage, upon the ground that the mortgagor was already taxed on the same property, and that to tax the mortgagee also would be double taxation. The court shortly overruled him, however, pointing out, what would seem to be obvious on its face, that the mortgagee is not the one to complain. As a matter of fact, we may note, under the method of assessment then in force in California and now in force here, he is greatly benefited, because the mortgagor is compelled to pay taxes on values which do not exist, which naturally tends to reduce the taxes on the values which do exist, and also because the mortgagee is frequently enabled to dodge his taxes altogether.

The mortgagee having thus failed, the *mortgagor* took up the controversy, and in

Lick v. *Austin*, 43 Cal., 590,

resisted the tax upon his mortgaged interest, claiming that that interest should have been deducted from his total assessment. The court, however, dismissed his complaint. The ground of the opinion was that if the *mortgagor* paid the tax on the mortgaged interest, he did it by voluntary agreement with the mortgagee, not by force of law, and therefore had no ground of complaint; whereas, if the *mortgagee* paid the tax,

the mortgagor could not complain that *his own land* was subject to double taxation.

Ibid. per Rhodes, J., p. 594.

And see the statement of this case by Crockett, J., in the later case of

Savings & Loan Society v. *Austin*, 46 Cal., 415, 483-4.

This reasoning begins with a misstatement of fact and ends with entirely missing the point. If the mortgagor paid the tax, he did it by force of law—or at least by force of the city authorities—and not at all by voluntary agreement. He paid it because he was *assessed* for it, just as the plaintiff is assessed for it in the case at bar, and not at all because he *undertook* to pay it. On the other hand, it is perfectly true that neither party is assessed twice for the same property; but yet one of the parties is assessed for more property than exists and for more property than he owns, and that is just as good a ground of complaint as to be taxed twice on the same property. The difference, real enough as a matter of careful and accurate thinking, contains no ground for a difference in the granting of judicial relief. The reasoning of the court was based upon an unworthy technicality. And the court was subsequently compelled to admit that the effect of these decisions was that neither party had a legal grievance.

Savings & Loan Society v. *Austin*, 46 Cal., 415, 483-4.

The Court will notice in the *Lick* case, the appearance of the economic theory of shifting the burden of the tax by agreement between the mortgagor and the mortgagee. That theory makes its reappearance in the subsequent case of

Savings & Loan Society v. *Austin*, 46 Cal., 415,

where the mortgagee, in spite of his earlier de-

feat, returned to the fray and sought again to avoid the tax upon his mortgage. The case was important in the sums involved and the counsel employed, and was twice argued. Most of the judges wrote opinions, but the two elaborate opinions of Crockett, J., are the ones which are generally accepted as containing the best statement of the theory and the law. He held, as we have before indicated, that inasmuch as the mortgagee, either implicitly by increasing the interest or explicitly by specific agreement, compels the mortgagor to assume the burden of the tax, it follows that to tax the mortgagee is, by inexorable economic law, to tax the mortgagor twice. He went on, however, to hold that since it did not appear in the facts of the case then at bar that *either* tax had been paid, an injunction to restrain the collection of the tax from the mortgagee should be denied. Thus he inaugurated the famous doctrine that in order to enjoin double taxation, it must appear that the tax has been paid at least once.

This difficulty was easily overcome, however, and in a later case in which the mortgagee showed specifically that the mortgagor had paid the tax, he succeeded in avoiding taxation himself.

People v. *Hibernia Bank*, 51 Cal., 243. And see particularly the opinion of Crockett, J., at page 254.

There are two curious shifts of opinion in these four California cases, each of which deserves careful attention. In the first place, the court began by holding that the mortgagee could not complain of the tax on his mortgage, and ended by holding that he could complain. This change of view is explicitly recognized by the court.

People v. *Hibernia Bank*, 51 Cal., 243, *per* Crockett, J., at pp. 253-4.

In the second place, the court began by holding

that the mortgagor could not complain when he assumed the mortgagee's taxes, because he assumed them voluntarily and by agreement, and it ended by holding that the mortgagee could complain, because the mortgagor assumed the tax under compulsion of an economic law. In other words, the court really changed its conception of the nature of the agreement by which the tax is shifted, holding first that it is voluntary and then that it is by economic compulsion.

The total effect of the California cases may be summed up as follows: They established the law, under a constitutional requirement of uniformity in taxation, that A, who owns only $40,000, is legally to be taxed on $100,000, while B, who owns $100,000, is to be taxed on only $40,000, and that on the curious plea that by taxing A on more than he owns and by taxing B on less than he owns, A is saved from double taxation. And the court further held that A, who was hurt by the then existing methods of taxation, could not complain, while B, who was not hurt, but was doing the hurting, could complain because A was getting hurt.

It is only necessary to add that the final conclusion of the California courts, that the mortgagee should be excused from taxation, has been expressly repudiated by other courts of last resort,

Ala. Gold Life Ins. Co. v. *Lott,* 54 Ala., 499;

State v. *Carson City Savings Bank,* 17 Nev., 146;

Lamar v. *Palmer,* 18 Fla., 147;

City of New Orleans v. *Mech. & Traders' Insurance Co.,* 30 La. Ann., 816,

and even in California has been overruled by constitutional amendment.

See also the following cases in which the mort-

gagee's efforts to avoid taxation have met defeat:

State v. *Runyon,* 41 N. J. Law, 98;
People v. *Rhodes,* 15 Ill., 304;
Augusta Bank v. *Augusta,* 36 Me., 255;
People v. *Worthington,* 21 Ill., 171;
Griffin v. Board of Review, 184 Ill., 275;
Appeal Tax Court v. *Rice,* 50 Md., 302;
Savings Society v. *Multnomah Co.,* 169 U. S., 421.

In connection with this point one error of the books may be explained. In these and other cases in which the mortgagee is plaintiff, it is frequently said that "real estate may be taxed "to a mortgagor in possession while the mort- "gagee is taxed for the money secured by the "mortgage; and these provisions are not con- "sidered as subjecting property to double taxa- "tion," and this supposed statement of the law has passed into the text books.

2 Lawyers Rep. Ann., 350, n.
1 Desty on Taxation, 203;
1 Cooley on Taxation, 3d ed., 391-2.
Gray on Taxation, §1370.

This doctrine however, has never been announced in any case to which the mortgagor has been a party, and it is, or should be, clear that casual remarks about the rights of the mortgagor uttered in legal proceedings to which he is not even a party are hardly conclusive adjudications that he has no such rights, and that these cases are not therefore to be taken as in any sense precedents for the case at bar.

* * * * * * *

There is one difficulty in the theory which we advance which must be frankly faced, although upon inspection it will apear to be not very serious. It will be argued that the owner of the

tangible property must be taxed for it in its entirety because he owns it and it is his property, and that to deduct his debts, while that privilege is allowed to him by statute because it is just, is nevertheless to exempt him, to just that extent, from taxation on property that he owns.

This difficulty assumes its most formidable and portentous appearance in the case of the mortgage of land, where the law is like that of New York, that a mortgage is only a lien. In that case the right is vested in one person, while the title to the land is vested in another, and it is consequently not easy to see why the duty of the assessors does not require them to assess the land to its legal owner. The difficulty is least formidable in a case like that of the assessment of mortgaged personal property. In that case, the right and the tangible property are vested in one person, the mortgagee, and their close and intimate connection are plainly visible.

There is another illustration in which the right and the tangible property are vested in one person and which we desire to press earnestly upon the attention of the court. The existing law of the State of New York is supposed to be that the mortgagor has the complete legal title to the mortgaged land, and for the present purposes of our argument, we shall assume that statement of the law to be correct. Suppose, however, a statute were enacted which should restore mortgages to their ancient common law status as conveyances of the legal title to the mortgagee. What effect would be produced upon the collection of taxes by the change in the legal effect of the mortgage which we have suggested? Would the mortgagee be assessed for the bond and also for the land?

The separation of ownership is not a valid distinction: the intangible right is one thing, and the

tangible property out of which it is to be satisfied is another thing. If the right is not to be deducted from the property, when the ownership of the two is dissociated, it is not to be deducted when the ownership is united: if the right is to be deducted when the ownership is united, it is also to be deducted when the ownership is dissociated.

If we are to solve this problem of the deduction of intangible rights at all, we must recognize that it depends upon something other than the nature of the property involved, whether real or personal, and upon something other than the conjunction or disjunction of ownership: the solution is to be found in the relation between intangible rights and tangible property generally. Even though a right is not made a specific lien on a specific property, nevertheless, if it is ultimately to be satisfied out of the property, it creates an interest in that property superior to that of the legal title, because by due judicial process the legal title may be appropriated and used in satisfying it. In other words, the debtor's property is subject to be taken on execution at the suit of the creditor, and that right of the creditor is paramount to all the debtor's rights of ownership. When, therefore, the assessor in his duty to assess comes upon tangible property the title to which is in A, but which must be used to satisfy a right in B, he must recognize the fact that the ultimate ownership, the right which by force of the law itself is superior to and dominates the legal title, is in B and not in A, and he must assess accordingly. Being forbidden by the Constitution to assess fictitious values, he must assess the real values between A and B according to their real interests and not according to the technical forms which their various and complicated legal rights may take.

Only upon this doctrine can we support such a decision as that rendered by this court at the last term,

Metropolitan Life Ins. Co., v. *New Orleans*, 205 U. S., 395.

The Insurance Company, a New York corporation, was taxed in Louisiana with respect to moneys which it lent to a citizen of Louisiana. It was urged in its defense that the notes and other writings evidencing the loan were specialties kept at the home office out of the jurisdiction of the taxing state and by the common law could only be taxed in the state of the home office. This court brushed aside the common law technicalities about the *situs* of specialties, and refused to permit the truth to be obscured by fiction—a precedent upon which we confidently rely. This court further held the truth to be that the capital of the Insurance Co. was actually invested in Louisiana, and was consequently rightly taxable there.

Now we must remember that the property assessed was a loan. The title to the money lent was originally in the lender: by the loan transaction it passed to the borrower. The tangible assets of the lender were reduced by the amount of the loan: the tangible assets of the borrower were increased by that amount. Neither party was impoverished by the transaction and neither party was enriched: there was no change in the situation of the values. The lender's decrease in tangible property was offset by an increase in its intangible rights and the borrower's increase in tangible assets was offset by the intangible right given to the lender.

One thing is certain, however: the title to that tangible property, the money lent, the real value that was taxed, passed out of the lender into the borrower, and in so doing it passed out of the State of New York into the State of Louisiana.

Consequently the lender had no property in Louisiana, except that given to it by its intangible right against the borrower. Unless, therefore, that right was a right in the borrower's general property paramount to his title, the lender had no property in Louisiana whatever. It certainly had no capital there, unless what had originally been its property and had become the property of another and was represented only by an intangible right to take it back, was still capital by virtue of the superiority of the right over the title.

That explanation, however, does justify, and amply justifies, the conclusion reached by the court. The right of the lender *was* paramount to the title of the borrower; it was an absolute, indefeasible right to property *in* Louisiana; and consequently that property *in* Louisiana was constitutionally taxable to *the lender* as *owner*. The correlative decision, the one which flows from it as the logically and constitutionally necessary consequence, is that the same property *cannot* be constitutionally taxed to the borrower. To tax the borrower on the money lent and the lender on the credit is to tax fictitious values. Therefore the constitutional duty of the assessor is first to determine the real values and then to assess those real values to those who really own them. As between the borrower and the lender, that means the lender, not the borrower.

The *Metropolitan Life Insurance* case is the culmination of a series of decisions (they are cited in the opinion of Mr. Justice Moody) which have finally established in this court the ultimate and paramount right of the creditor in the assets of the debtor. It therefore finally disposes of the only really debatable issue to be found in the whole vexed question of the fictions of taxation—the question of the proper party plaintiff to main-

tain proceedings to correct the fiction. The only one who can maintain them is the debtor, the legal owner of the tangible property, because the burden of the fiction falls upon him, and because he is taxed upon tangible property the ultimate and paramount right to which, over and above his legal title, vests in his creditor, the owner of the intangible right.

Now at last we can understand the fictions of taxation in their final analysis. The assessment of intangible rights independently of the tangible property out of which they are to be satisfied necessarily involves the assessment of fictitious values. The excess of value is exactly equal to the assessed value of the intangible right. The reason that there is an excess, and therefore a fiction, is that the real value, which resides in the tangible property, is assessed first to the owner of the tangible property and next to the owner of the intangible right. In other words, *one* value is assessed as *two* values, and the sum of the two is a fictitious total. The one value should be assessed as only one value, and it should constitutionally be assessed to the owner of the intangible right, because the intangible right is superior to and dominates the legal title.

* * * * * * *

Such are the principles for which I contend. If this court is prepared to announce them in their broad form—and there is nothing but antiquated custom and legal technicalities to prevent—it will not only remove one of the greatest reproaches to our present methods of collecting government revenues, but it will mark an epoch in our history: it will demonstrate as has never been demonstrated before, the ability of our jurisprudence to rise superior to its own historical traditions and to advance by its own inherent powers to new and truer conceptions.

II.

It is unconstitutional to tax A on the property of B.

This point is presented by the second assignment of error: if the plaintiff-in-error is taxed upon more property than he owns, then he is taxed upon property which somebody else owns, and therefore he does not receive the equal protection of the laws.

A.

The right of the mortgagee is a legal interest in the land itself.

Hitherto in my argument I have assumed that the current legal conception—so far at least as it is held by the average New York attorney—is correct, and that the mortgagor has the full legal title in fee to the mortgaged premises. It would perhaps be difficult to conceive any proposition of law at once so widely believed and so at variance with authority. If anything is certain, it is that the mortgage operates to defeat and limit the full legal title of the mortgagor: he does not enjoy, and he cannot convey, a full legal title. The rest of the legal title is in the mortgagee, and in order to produce an effective transfer of the fee both the mortgagor and the mortgagee must join in the conveyance. In other words, the mortgagor and mortgagee, even in states where the mortgage is only a lien, are possessed of joint undivided interests in the land, and to that extent are joint-tenants.

Thus it has been held in this court that a mortgagee is an "assign" of the owner of the land, and as such entitled to assert certain legal rights conferred by statute on an "assign" of the owner.

U. S. v. *Commonwealth Title Ins. & Trust Co.*, 193 U. S., 651.

Speaking for this court, Mr. Justice McKenna said: "A brief definition of a mortgage under modern law is not easy to make. At common law a mortgage was a conditional conveyance to secure the payment of some act, to be void upon such payment or performance. By more modern law and under the statutes of many States a mortgage is a mere lien upon land. Its dominant attribute is security, but nevertheless it must be regarded as 'both a lien in equity and a conveyance in law.' Pomeroy, §1191. The interest of a mortgagee in the land is therefore conveyed to him by the mortgagor, and even if under the laws of Montana a mortgage is primarily security for a debt and creates only a lien, it is a lien which may become the title."

An even more important ruling, and one which is decisive of this case, is contained in

Savings Society v. *Multnomah Co.*, 169 U. S., 421,

where it was held that a mortgage is constitutionally taxable as real estate "This court has always held," said Mr. Justice Gray, "that a mortgage of real estate made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land as will defeat the priority given to the United States in the distribution of the debtor's estate. * * * If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation."

The point of the decision is that a mortgage cannot be constitutionally taxed as real estate unless it *is* real estate. The only escape from this conclusion is that it is constitutional to tax that as real estate which is *not* real estate—a proposition which is too absurd for argument.

The fact of the matter is that the mortgagee has at his disposal two separate and distinct legal rights for the protection of his loan: one is a right *in personam*, represented by the bond, and the other is a right *in rem*, represented by the mortgage. The one gives him a general right to proceed against the general assets of the mortgagor with the aid of the court, while the other gives him a specific right in a specific parcel of land. Either one of these may be made the subject of taxation, and the States differ in their choice on this point. New York directs the right *in personam* to be taxed, while California directs the right *in rem* to be taxed;

Tax Law of New York, §2, subd. 5;
Const. of California, Art XIII, §4;

but either method is constitutional because it conforms to the actual facts. Upon both principle and authority, therefore, it is clear that the mortgagee has, for all purposes, a right *in rem*, a title in the mortgaged property itself, which *pro tanto* defeats and limits the title of the mortgagor with reference to the same property.

B.

The interest of the mortgagor is limited to that which remains over and above the legal interest of the mortgagee, i. e., is limited to the so-called equity.

The mortgagor's equity at common law was a mere right *in personam*. To enforce it he had to have recourse to the court of Chancery, which could proceed only *in personam* and had no jurisdiction *in rem*. Even the court of Chancery could not reconvey the land itself: its powers were restricted to the issuance of a decree compelling the mortgagee to reconvey, upon payment of the debt with interest and costs.

When, by the lapse of time and the change of

legal conceptions, the mortgage ceased to be a conveyance of the entire fee, it was held to be a lien only. Even so, however, as a lien it did not cease to be an interest *in* the land itself. We need not pause over words, nor dispute over the obscure problem whether it is an estate *in* the land or a lien *upon* the land. Whatever it is, it is a present *interest in the land*, which pledges the land itself as security for the debt.

All that remains to the mortgagor therefore, and all that can remain to him, is a legal interest over and above that which he has conveyed, out of himself to the mortgagee.

If A should deliver a deed to B providing that, when the land was sold, B should receive a fixed sum out of the proceeds and that A should receive the remainder, there could be no doubt that A and B would be joint-tenants or tenants in common in undivided interests. One of these interests would, to be sure, be a fixed and liquidated interest, and the other would be contingent; but so long as the land should remain unsold, the two interests would be joint and undivided. If, thereafter, A should deliver to B a covenant that he would pay to B the value of his liquidated interest within a definite period of time, upon which payment B's interest should cease and determine, the nature of the two interests in land would not be changed, except so far as B's interest should be limited in duration, but it would be impossible to distinguish the resulting legal situation from that produced by the execution and delivery of a mortgage in a state where a mortgage is held to be a lien. And so it follows that, even under the lien theory, the mortgagor and mortgagee are in substance and in every legal intendment joint owners of the land, though the mortgagor's interest is contingent in

amount and the mortgagee's interest is defeasible in time. And this is the clear law.

In the case of

Everson v. *McMullen*, 113 N. Y. 293, the defendant purchased the equity in mortgaged lands from the plaintiff's husband and at the same time he paid off the mortgage. It was held that as to the equity he derived title from the mortgagor and as to the mortgaged interest he derived title from the mortgagee, so that in an action by the mortgagor's wife for the admeasurement of her dower, her dower interest was restricted to the equity, although technically her husband had title to the whole in fee. Judge Finch, speaking for the court, at page 299, said:

"The purchaser from the husband acquired only the equity of redemption. While, technically, he took the fee, in truth he took it *subject to the interest of the mortgagee carved out of it by the mortgage as a lien. Payment to the mortgagee* in an equitable sense, *is a purchase of that interest* from him, and *in equity the owner of the fee*" [*i. e.*, the defendant, the purchaser of the premises] "*holds it under the mortgagee as to that interest, and under the husband as to the equity of redemption.*"

An action for the admeasurement of dower is a common law action, determining legal instead of equitable rights, and consequently this decision necessarily determines that as a matter of mere legal title, the mortgagor's interest is limited to the interest over and above the mortgage, and that dower is limited to that interest.

That the mortgagor's taxable property interest in the land is restricted to the contingent interest over and above the liquidated interest of the mortgagee has recently been expressly decided by the Court of Appeals in the case of

People ex rel. Weber Piano Co., v. *Wells*, 180 N. Y., 62.

This is such a remarkable and important case that I must be excused for stating it at some length.

By Section 12 of the Tax Law as interpreted by the courts,

People ex rel. Union Trust Co. v. *Coleman*, 126 N. Y., 433,

the process of taxing corporations on their personal estate has taken a form which differs from the similar taxation of natural persons. The corporation is required to make a return to the taxing officers of the gross amount of its assets. From this gross amount it is allowed to make certain deductions, such as for debts and for stock of other corporations, these deductions being intended to avoid double taxation. It is allowed to deduct "*the assessed value of its real estate,*" this deduction being allowed also to avoid double taxation, since the corporate real estate is separately assessed, along with that of natural persons, on the real estate rolls.

In general this process is simple enough and just enough to meet the usual situation; but one complication arises under it which has been the cause of very considerable litigation. It is the inveterate habit of the tax assessors to assess land at much below its real value, notwithstanding the express statutory provision to the contrary, and the consequence is that if only the assessed value is deducted from the gross assets, which naturally have to include the land at its real value, there remains a surplus of personalty which is in excess of the true amount of the personalty. An illustration will make this clear:

Assume a corporation with assets of $1,000,000, equally divided between realty and personalty. Assume, further, that the realty has been as-

sessed at only $350,000. If that assessed value be deducted from the total assets, there remains an apparent amount of personalty of $650,000, when the real amount of personalty is only $500,000. In other words, the error in the assessment of the land has been made up by a compensating error in the assessment of personalty: the $150,000 *undervaluation* of land has become $150,000 *overvaluation* of personalty.

There came a time, however, when the assessors, in valuing certain real estate, gave it a value very considerably *in excess* of the value as returned by the corporation in the statement of its gross assets, and that gave rise to the case of the *Weber Piano Company.*

People ex rel. Weber Piano Co. v. *Wells*, 180 N. Y., 62.

It is obvious that, by this reversal of their usual custom, the assessors produced a curiously corresponding reversal in the position of the corporation and the city. Whereas in the other cases it was the corporation that wanted to deduct the real value and the city that wanted to deduct the assessed value, it now became the city that wanted to deduct the real value and the corporation that wanted to deduct the assessed value.

On the face of it, the equities were apparently with the corporation; if corporations are required to deduct the assessed value when the effect of such a deduction is to *increase* their taxes, they should be permitted to make the same deduction when the effect of it is to *decrease* their taxes. Assume, for example, that in the case of our supposed corporation of $1,000,000, the land, instead of being undervalued, had been overvalued at $650,000. The deduction of this sum from the gross assets would leave, to be sure, only $350,000 of personalty; but that amount, together with the assessed value of the land, would leave the

corporation paying taxes on the exact amount of its assets. In other words, the compensating error works both ways: just as the undervaluation of land in our first supposition produced a compensating overvaluation of the personalty, so, in the later supposition, the overvaluation of the land produces a compensating undervaluation of the personalty.

The effect of refusing to permit this compensating error when the realty is overvalued is clear. If in our supposed case, the corporation were permitted to deduct only the real value of its lands, it would be assessed for personal property at $500,000. It would, at the same time, however, be assessed for land at $650,000, and its total assessment would be for $1,150,000, or $150,000 in excess of its actual assets, this excess being the exact amount of the overvaluation of the land. In other words, it would be taxed on $150,000 of property which it did not own.

In the *Weber Piano Company* case the decision was that the corporation should be allowed to deduct only the value of the land as disclosed by their statement of assets, and that it should not be allowed to deduct the assessed value. The effect of the decision was therefore that the corporation was assessed for property much in excess of its real assets.

The reason why the land happened to be overvalued was that it was subject to a mortgage, which was not, however, a personal debt of the corporation. The consequence was that the assessors, following their habit, had assessed the whole property to the corporation without reference to the mortgage, while the corporation, following the necessity of the case, returned as their assets only the equity. They obviously could not return their *assets* as including the mortgaged interest. The result, however, was that the cor-

poration asked to deduct the entire assessment, while the city wanted to allow a deduction of only the amount contained in the corporation's return.

The dispute turned upon the statutory phrase, "assessed value of *its* real estate."

The land in question was actually worth, as found at the trial, $250,000. It was subject to a mortgage of $200,000, leaving an equity of $50,000, or one-fifth of the entire value. It was assessed for $150,000.

Upon that situation the Corporation Counsel argued that the corporation's "real estate" was only the equity, and therefore only the assessment of the equity should be deducted. In the course of his brief he said:

> "In the present case there is no question "as to the respective interests of the rela- "tor and the mortgagee in the particular "property. Although, technically, the re- "lator has the legal title to the entire par- "cel, and the mortgagee has merely a lien "upon it, practically the relator *owns but "an undivided one-fifth interest*, and has "so reported."

The attorney for the relator, however, urged that the corporation's "real estate" was the whole land and that therefore the whole assessment should be deducted. In the course of his brief he said:

> "The title to this Seventh avenue prop- "erty is in the relator. The holder of the "$200,000 mortgage thereon has no title "therein; he merely has a lien thereon for "the amount of his mortgage."

The Court will observe another curious reversal of position. In the case at bar, the Corporation Counsel will plead that the plaintiff mortgagor owns the whole estate in the land, while we, as representing the mortgagor, ask the Corpora-

tion Counsel to abide by his former position and to admit that the mortgagor "owns but an undivided interest."

This reversal of position is due to the fact that the city is now conducting an arithmetical process exactly opposite to that which it was then conducting. Then the Corporation Counsel was subtracting the mortgagor's interest from the total of its taxable assets, and consequently he wished to minimize that interest to the lowest possible extent. Now he is seeking to increase the amount of the mortgagor's taxable assets, and consequently he wishes to magnify the mortgagor's interest to the largest possible extent. But the principle is the same, and it makes no difference whose bull is gored. If the mortgagor owns only the equity for the purposes of subtraction, he owns only the equity for the purposes of addition, and we may await, with interested curiosity, the attempt of the Corporation Counsel to reconcile his present position with his position in the *Weber Piano Co.*, case.

The Corporation Counsel prevailed in the Court of Appeals.

That court, speaking through Mr. Justice Cullen, decided that the company owned only the equity, that "the assessed value of *its* real estate" was only that portion of the assessed value of the whole which the equity bore to the real value of the whole, and that, the equity being only one-fifth, the corporation could deduct only one-fifth of the assessed value, or $30,000.

The court rested its opinion upon a sort of estoppel. "If the estate of the relator," said Mr. Justice Cullen, "was confined to the equity of re-"demption, it follows that it was only the as-"sessed value of the equity of redemption that it "was entitled to deduct." That is obviously just: one thing cannot be two different things at the

same time. The point of the case lies in the decision by the court that what was to be included on the one side as "assets" and what was to be deducted on the other as "real estate" were one and the same thing: "it seems to me reasonably "clear," said Mr. Justice Cullen, in another place, "that nothing can be the real estate of the "corporation unless it is at the same time its "property." Since, therefore, it is indisputable that the "assets" of the corporation included only its equity, it is equally indisputable that the "real estate" of the corporation included only that self-same equity, and the case is a conclusive authority for the proposition that only the equity is the "real estate" of the mortgagor.

The result of the case was, as we have seen, to tax the Weber Piano Co. on more property than it owned; but we cannot fully understand the decision unless we advert to the second paragraph of Mr. Justice Cullen's opinion. At page 63, he said:

> "The learned Appellate Division held in "*People ex rel. Farmers' Loan & Trust* "*Co.* v. *Wells* (94 App. Div., 463) that "mortgages on a taxpayer's real estate, "the payment of which he had not assumed "or become personally liable for, were not "debts and were not to be deducted from "the amount of his personal property in "assessing the latter for taxation. This "decision we unanimously affirmed in Oc- "tober last." [179 N. Y., 566, without opinion.] "The relator has thus far suc- "ceeded in accomplishing the very thing "condemned in the decision cited and this "by a simple though ingenious process."

This statement is not strictly accurate. As appears from the case on appeal the relator's gross assets were in round figures, $475,000 (the exact

figures are not important), and from these gross assets it was allowed to deduct only the assessed value of the equity, or $30,000. Thus there was left of apparent taxable personal property, the sum of $445,000, for which the relator was assessed and upon which it had to pay taxes. We must not forget, however, that at the same time the relator was also assessed for real estate at the sum of $150,000 and that it had to pay taxes on that amount. The consequence was that with a personal assessment of $445,000 and a real estate assessment of $150,000, the relator had to pay taxes on $595,000, and $595,000 was $120,000 in excess of the $475,000, its actual assets. If, on the other hand, the relator had been allowed to deduct the full assessment charged against it in respect of realty, or $150,000, there would then have been left of apparent taxable personal property only $325,000; but this personal assessment, coupled with its real estate assessment, would have exactly equalled its actual gross assets. In other words the rule of compensation would have worked, and the corporation's actual assets would have been the measure of its taxes. Thus it is clear that the corporation was not trying to deduct a debt which it did not owe, but was trying to escape taxation upon property which it did not own.

And yet there was another curious fact which we must take into account. The excess of assets for which the Weber Piano Co. was taxed was the difference, as we have seen, between $595,000, the combined assessment of its realty and its personalty, and $475,000, its actual assets. *This difference amounted to exactly* $120,000. *This difference is also the exact difference between* $150,000, *the assessed value of the whole land, and* $30,000, *the assessed value of the equity: in*

other words, it was the assessed value of the MORTGAGED INTEREST.

For the purpose of making the point clear we will present the figures in tabular form.

I.

THE ASSESSMENT ACCORDING TO THE RELATOR.

Total actual assets	$475,000
Assessed value of real estate	150,000
Net taxable personalty	$325,000
Assessed value of real estate	150,000
Total taxable assets	$475,000

II.

THE ASSESSMENT ACCORDING TO THE COURT OF APPEALS.

Total actual assets	$475,000
Assessed value of real estate (this being one-fifth of the whole assessment)	30,000
Net taxable personalty	$445,000
Assessment of real estate	150,000
Total taxable assets	$595,000
Total actual assets	475,000
Fictitious excess of assets taxed, but not owned	$120,000

III.

Total assessment of real property	$150,000
Assessment of equity	30,000
Assessment of mortgaged interest	$120,000

Now at last we can see whither our long trail leads. While the corporation was not trying to deduct from its actual assets a debt which it did not owe, nevertheless it was trying to escape taxation on a mortgaged interest—and that, as the court said, "by a simple, though ingenious process."

Simple and ingenious though it was, however, it presented a grave problem. It was impossible to regard the mortgaged interest as part of the assets of the company, or as entering into the value of its capital stock, or as in any manner enriching the stockholders (Mr. Justice Cullen's intimation to that effect may be disregarded as not seriously intended), and consequently the question whether its assessed value should be deducted became vitally important. If the mortgaged interest was properly assessable to the mortgagor as a part of "*its* real estate," then it was deductible by the relator. In that event, however, mortgagors who were natural persons would be assessed for it without any opportunity for deduction, while corporate mortgagors would be assessable for it, but could deduct an exactly equal value from the amount of their taxable personal assets. *In other words, the strange result would follow that corporations could escape taxation on the mortgaged interest when natural persons could not so escape.* This was the result that Mr. Justice Cullen foresaw and expressly refused to allow, and his decision to that effect was in all respects proper and necessary.

The initial error of the Weber Piano Co. lay in this, that it tried to subtract the assessment upon the mortgaged interest from the assessment of its personalty: it should have tried to sutract it from the assessment of its realty.

To this, as the only proper remedy, the decision of the Court of Appeals unmistakably points the

way. Immediately after that decision was handed down, the Weber Piano Co. should have instituted proceedings to reduce the assessment of its lands by the amount of its mortgage. In such proceedings it could say to the assessors, and say with truth:

> "The Court of Appeals has decided that our real estate includes only the equity, and does not include the mortgaged interest: therefore, only the equity, and not the mortgaged interest, should be assessed to us as our property."

What reply could be made to that argument? There is none to make and there was none made.

I pressed that case most earnestly upon the attention of the Court of Appeals, but it paid no heed. Having decided in the *Weber Piano* case that the mortgagor could deduct from its gross assets only the equity, because it owned only the equity, it decided in this case that the mortgagor is taxable on the whole land because he owns the whole land. It is therefore the law of New York today, so far as the decisions of the Court of Appeals can make the law, that at one and the same time a corporation mortgagor *does own* the whole land for the purpose of being taxed on its land, and that it *does not own* the whole land for the purpose of being taxed on its personal property.

It was no accident that led the Court of Appeals to decide this case without opinion: there was no opinion that it could write.

The fact is that both on principle and authority, mortgagor and mortgagee own separate but undivided legal interests in the mortgaged land, and that to tax the mortgagor on the mortgaged interest is to tax him on property which he does not own, but which he has conveyed to another.

This conclusion cannot be escaped except upon

some theory of the mortgage which denies its fundamental character and reason for being. We have on the one hand the debt and on the other hand the land. If the mortgage does not subject the land itself to the payment of the debt, if, in other words, it does not fulfill its essential function of affording security for the debt, then indeed it may not create an interest in the land; but under any such conception of its effect, it is reduced to a nonentity, a sort of scholastic *tertium quid,* a kind of Platonic idea, hovering like Mohammed's coffin, between heaven and earth, something which is neither debt nor security for the debt. It is only on terms like these that it is possible to avoid the conclusion that the total legal interest in the land is apportioned between the mortgagor and the mortgagee as joint tenants or tenants in common with undivided legal interests.

Now, by the assessment here under review the mortgagor is taxed on the whole value of the land, that is to say, on an interest in the land which belongs to somebody else, to-wit, the mortgagee. The question is therefore fairly presented whether it is constitutional to tax A on the property of B.

* * * * * * *

As a matter of fact, this same question is presented by the case of an unsecured debt as well as by the case of a secured debt. That is to say, the constitutionality of taxing the debtor on the creditor's property is just as much involved when the creditor's right is unsecured and runs only against the general assets of the debtor, as when it is secured and consists of a legal interest in some specific property of the debtor. As we have already seen, the creditor's right constitutes a claim to the debtor's assets which by force of law

is paramount to the legal title, and when the assessors find the real values it is their constitutional duty to apportion them among the real owners. This constitutional duty arises from the clause which requires them to observe due process of law, and therefore forbids them to assess values that do not exist. It also arises from the clause which requires them to extend to all persons the equal protection of the laws, and therefore forbids them to tax A on the property of B. As between debtor and creditor the *real* ownership, the ultimate and paramount right, in the debtor's assets is, to the extent of the debt, in the creditor, and to assess the debtor for that portion of his assets is to assess him for property which in reality belongs to another.

Under both aspects of the mortgage transaction, therefore—that by which the mortgagee secures a specific interest in specific property of the mortgagor, and that by which he secures a general interest in the mortgagor's general assets—the question is fairly presented whether it is constitutional to tax A on the property of B.

C.

The Constitutionality of Taxing A on the Property of B.

Strangely enough, there seems to be only one reported case in which the constitutionality of taxing A on the property of B has ever been decided. In that case the question was raised and decided in favor of the taxpayer: such a tax was held to offend against the Fourteenth Amendment.

County of Santa Clara v. So. Pac. R. R. 18 Fed. R., 385.

The constitution of California declares that

> "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby."

and that

> "*except as to railroad and other quasi public corporations,* in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof."

Under the exception of "railroad and other "*quasi* public corporations," the County of Santa Clara sued the Southern Pacific Railroad for taxes on its property without deduction of its mortgages thereon, and the railroad resisted the suit, upon the ground that the constitutional provisions just cited deprived it of its property without due process of law and denied to it the equal protection of the laws as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

The suit was brought in the Circuit Court of the United States and Judge Stephen J. Field of the Supreme Court sat as associate justice with Judge Lorenzo Sawyer of the local circuit. In two remarkable opinions, they held, *first,* that a corporation could invoke the protection of the Fourteenth Amendment; *second,* that the prohibition of that Amendment extended to the taking of property by way of taxation, if thereby the citizen was deprived of his property without due process of law, or denied the equal protection of the laws; and, *third,* that the taxation of the defendant railroad without deduction of its mort-

gage was in violation of those provisions of the Amendment.

County of Santa Clara v. *Southern Pacific R. Co.*, 18 Fed. R., 385.

The judgment of the Circuit Court was affirmed by this Court, but upon another ground.

County of Santa Clara v. *Southern Pacific R. Co.*, 118 U. S., 394.

The decision of the Circuit Court was the first which brought the subject of taxation within the scope of the Fourteenth Amendment, and it stands today as a clear and compelling authority for the proposition that an enactment by a state which authorizes the taxation of mortgaged lands without deduction of the mortgage is in violation of that amendment.

Judge Field will go down in history with a greater fame for learning and ability than Judge Sawyer, but in that case the most accurate and painstaking analysis of the situation is to be found in Judge Sawyer's opinion. In particular he discusses one phase of the tax which is of importance to us now. A hasty reading of the case will lead to the impression that the inequality there held to be unconstitutional existed only between the "*quasi* public" mortgagor and other mortgagors; but nothing could be more erroneous. Judge Sawyer considered the relation of the railroad company, not only to other mortgagors, natural persons and private corporations, but also to the *mortgagee and to the world at large.* In the following extract from his opinion he said, the italics in all cases being his own:

"Whatever the property, * * * real or personal, mortgaged to secure a debt, or however used, the value of the debt so secured, in the case of everybody, '*except a railroad and other quasi public corporation,*' is to be deducted from the value of the property mortgaged; and the

value only of the property mortgaged, 'less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof.' That is to say, that the property is to be divided between the parties according to the value of their respective interests, and whatever the nature or extent of the interest of each in the property may be, it shall be taxed to the real owner. But in the case of a 'a railroad or other *quasi* public corporation,' there is to be no reduction of the value of the mortgaged property —no division according to the interests of each— and the whole is to be taxed to one party, although he, in reality, does not *own* the whole. In one case, if property is mortgaged to the extent of half its value, the owner is taxed upon one-half the value, and the owner of the debt secured, or the mortgagee, is taxed upon the other half. But in the other case, the owner of the legal title to the property is assessed and taxed upon the whole value of the property, and the other party, who is interested to the extent of one-half, upon none. A., a natural person, or even a corporation other than one of the excepted class, has $50,000 in cash—all the property he has—and purchases of B., another natural person, a piece of real estate for $100,000, that being its actual value, paying one-half down, and giving a mortgage of $50,000 to secure the balance of the purchase money. The constitution, in effect, says—and in this instance such is the real, substantial state of facts—that A. and B. each has $50,000 in the property, one-half not having been paid for by A. and each shall be assessed and pay a tax upon his own interest in it, amounting to $50,000. A. in this instance, is worth only $50,000, and if he pays taxes upon a larger amount he pays taxes upon property he does not really own—upon property owned by

somebody else. This seems to be a self-evident proposition. C. 'a railroad or other *quasi* public corporation,' also has $50,000 cash, and purchases of B. for its proper use, an adjoining piece of real estate for $100,000, which is also its actual value, paying $50,000, and giving a mortgage to secure the balance of the purchase money. In this case, as in the other, the actual interest of each in the property is $50,000. They stand precisely upon the same footing in all particulars with reference to the property. C. has only $50,000 in the property,—it not having paid for the other half,—and B. the rest. But in this case the constitution says that C. shall, nevertheless, be assessed for and pay taxes upon the whole property, *double* the amount he *really owns, and B. shall not be required to pay anything.* That is to say, that C. shall not only pay the tax on its own property, but the tax upon B.'s property; that money, to the amount of the tax assessed upon $50,000 belonging to B., shall be taken by the state or county from C., and appropriated to the use and for the benefit of B. to liquidate B.'s share of the public burdens. This sum, being so much more than C.'s share of the public burdens, and being in fact B.'s share, *the result of the operation is, not only to take so much property from C. for public use, without compensation, but also to arbitrarily take it from C. and apply it to the use and benefit of another private party, B., without compensation. The result would be the same whether the property of A., B., and C., thus situated and mortgaged, is land, a railroad operated in one or more counties, or any other kind of property.*

"Does a law which authorizes such proceedings—such discriminations—bear or press equally upon A. and C., or equally upon B. and C.? Is C. equally protected in its rights of property with A., or equally protected with B., *or equally with all*

other natural persons; or all corporations other than railroad or other *quasi* public corporations? Although situated precisely alike with reference to their property, do they feel the pressure of the public burdens equally and alike? The question does not appear to me to admit of argument. Upon the very statement of the proposition, it seems to me to be self-evident that a law authorizing and *requiring* such proceedings does not afford, but expressly *denies,* the equal protection of the laws."

The *Santa Clara* case was decided upon great consideration. A similar decision, rendered the year before,

County of San Mateo v. *Southern Pacific R. R. Co.,* 13 Fed. R., 722,

had excited a loud popular clamor, and the state authorities had endeavored to secure a reversal of it through a new action. The *Santa Clara* case was the result. In the new action the Court felt the pressure of the public feeling,

See remarks of Field, J., in 18 Fed. R., 414,

but refused to alter its decision. Indeed, Judge Sawyer, in writing the passage which we have quoted, took it almost *verbatim* from his earlier opinion and simply emphasized it by inserting italics. The decision is therefore to be regarded as having a very special and peculiar authority.

Authority, however, is not needed to support my contention. That to tax A upon the property of B is to deny to A the equal protection of the laws is self-evident: argument in support of it is not only superfluous, but impossible.

The real truth is that, if my earlier contention that taxation by fiction is unconstitutional is unsound, then the only constitutional method of taxation in the case of mortgaged lands is to tax the mortgagor on the equity, to tax the mortgagee on

the bond, *and to tax the mortgagee again on his interest in the land.* In other words, it is the mortgagee and not the mortgagor who ought to be subjected to the burden of the fictitious assessment, because it is the mortgagee, and not the mortgagor, who carries the protection of duplicated legal rights. Only so it is possible to avoid taxing the mortgagor on property which he does not own, but which he has conveyed to another.

III.

In Conclusion

The questions which I have attempted to argue upon this writ of error have never been presented in this court or indeed in any other. The books are filled with *dicta* to the effect that "double taxation" is not unconstitutional, but the real questions which lie behind that phrase have never been raised in any important case, and even when they have been involved, they have not been presented by the only proper party plaintiff, by the one, that is to say, upon whom the burden of the fiction falls. This case, therefore, comes before this Court as in every aspect of it a new question, and I ask this Court to decide it upon the broad and fundamental proposition that taxation by fiction is unconstitutional. This is a great stumbling block today in the pathway of those who would correct the evils of our present methods of state and municipal taxation. If they can have an authoritative declaration from this Court that taxation by fiction is unconstitutional, then will that stumbling block be removed and our general property tax will be placed necessarily upon a sound and scientific basis.

More than that, however. By such a decision our modern American jurisprudence will indeed redeem itself from the just charge of fostering fic-

tions and untruths, and will triumphantly prove its own inherent power to discard antiquated doctrines and to keep even step with the progress of the times.

The judgment under review should be reversed.

Dated New York, July 23, 1907.

EVERETT V. ABBOT,
Of Counsel for plaintiff-in-error.

Appendix

of statutes relating to the levying and collection of taxes in the State of New York.

The Tax Law.

§ 2. Definitions . . . . . .

3. The terms "land," "real estate" and "real property," as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures, and superstructures, erected upon, under or above, or affixed to the same; . . . . .

5. The terms "personal estate" and "personal property," as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this State, however secured or wherever such securities shall be held; . .

§ 3. Property liable to taxation.

All real property within this State, and all personal property situated or owned within this State, is taxable unless exempt from taxation by law.

§ 9. Place of taxation of real property.

When real property is owned by a resident of a tax district in which it is situated, it shall be assessed to him. When real property is owned by a resident outside the tax district where it is situated, and is occupied, and the occupant is a resident of the tax district, it shall be assessed to either the owner or occupant. If the occupant resides out of the tax district or if the land is unoccupied, it shall be assessed as non-resident, as hereinafter provided by article two. In all cases the assessment shall be deemed as against the real property itself, and the property itself shall be holden and liable to sale for any tax levied upon it.

§ 12. Taxation of corporate stock.

The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll or shall be exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value.

The Greater New York Charter.

Deputy tax commissioners; duties of in assessing taxable property.

§ 889. It shall be the duty of the deputy tax commissioners, under the direction of the board of taxes and assessments, to assess all the taxable property in the several districts that may be assigned to them for that purpose by said board, and they shall furnish to the said board, under oath, a detailed statement of all such prop-

erty, showing that said deputies have personally examined each and every house, building, lot, pier or other assessable property, giving the street, lot, ward, town and map number of such real estate embraced within said districts, together with the name of the owner or occupant, if known; also the sum for which, in their judgment, each separately assessed parcel of real estate under ordinary circumstances would sell if it were wholly unimproved; and separately stated, the sum for which, under ordinary circumstances, the same parcel of real estate would sell with the improvements, if any, thereon; with such other information in detail relative to personal property or otherwise, as the said board may from time to time, require. Such deputies shall commence to assess real and personal estate on the first Tuesday in September in each and every year.

Annual record of assessed valuation; what to contain and when to be open for examination and correction.

§892. There shall be kept in the several offices established by the department of taxes and assessments books to be called "the annual record of the assessed valuation of real and personal estate of the Borough of ," in which shall be entered in detail the assessed valuation of such property within the limits of the several Boroughs of the City of New York as established by this act. In such books the assessed value of real estate shall be set down in two columns; in the first column shall be given, opposite each separately assessed parcel of real estate, the sum for which such parcel under ordinary circumstances, would sell if wholly unimproved; and in the second column shall be set down the sum for which the said parcel under ordinary circumstances would sell, with the improvements, if any,

thereon. The said books shall be open for public inspection, examination and correction from the second Monday in January until the first day of April in each year; but on the said last mentioned day the same shall be closed to enable the board of taxes and assessments to prepare assessment rolls of the several boroughs for delivery to the board of aldermen. The said board previous to and during the time the said books are open as aforesaid for inspection shall advertise the fact in the City Record and in such other newspaper or newspapers published in the several boroughs created by this act as may be authorized by the board of city record.

Assessed valuation of personal property; how to be entered.

§894. The assessed valuation of all personal property shall be entered by said deputy tax commissioner, or by such other persons as may be assigned to that duty by the department of taxes and assessments in the several offices, in books or rolls, in alphabetical order, of the names and persons and corporations subject to taxation. No tax or assessment shall be void by reason of the name of the rightful owner or owners, whether individuals or corporations, or real estate in any of the said boroughs not being inscribed in the assessment rolls or lists; but in such case no tax shall be collected except from the real estate so assessed. * * *

Assessment rolls; duties of board of aldermen, respecting.

§910. At such annual meeting the board of aldermen must make such alterations in the description of real property belonging to non-residents as may be necessary to render such descriptions conformable to the provisions of law; and if such alterations can not be made, they must ex-

punge the descriptions of such real property, and the assessment thereon from the assessment rolls. They must also estimate and set down in a fifth column, to be prepared for that purpose in the assessment rolls, opposite to the several sums set down as the valuation of real and personal property, the respective sums, in dollars and cents, to be paid as tax thereon, rejecting the fractions of a cent. They must also add up and set down the aggregate valuations of the real and personal property in the several boroughs as corrected by them; and must transmit to the comptroller of this state by mail a certificate of such aggregate valuations, showing separately the aggregate amount of the real and personal property in each borough, as corrected by the board of aldermen.

Corrected roll to be delivered to receiver of taxes.

§911. They must also cause the assessment rolls of each borough, when corrected according to law, and finally completed, or a fair copy thereof, to be delivered to the receiver of taxes in and for the city on or before the fifteenth day of September thereafter, with the proper warrant or warrants annexed, signed by the president of the board of aldermen and countersigned by the city clerk, directing and requiring him to collect from the several persons named in the assessment rolls the several sums mentioned in the last column of such roll, opposite to their respective names, and to pay the same from time to time, when so collected, to the chamberlain of the city.

Receiver of taxes to give public notice.

§914. The receiver of taxes, shall, immediately after he shall have received the assessment rolls, give public notice for at least five days in the City Record and in such newspaper or newspapers published in the several boroughs as may be designated by the board of city record, or in de-

fault of any newspaper being published in any borough, in such newspaper or newspapers having a general circulation in such borough as the board of city record shall direct, that said assessment rolls have been delivered to him and that all taxes shall be due and payable at his office in the said respective boroughs on the first Monday in October, and that in case of payment before the first day of November thereafter the persons so paying shall be entitled to the benefits mentioned in the next section. All taxes shall be and become liens on the real estate affected thereby on the day when they become due and payable as above provided and shall remain such liens until paid.

Crist, Scott & Parshall, Cooperstown, N. Y.
New York Office, 220 Broadway.

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42.

No. [redacted]

IN THE

SUPREME COURT of the UNITED STATES

ON WRIT OF ERROR TO THE
SUPREME COURT OF THE STATE OF NEW YORK.

TIMOTHY F. PADDELL,

Plaintiff in Error,

against

THE CITY OF NEW YORK,

Defendant in Error.

REPLYING BRIEF for PLAINTIFF in ERROR

EVERETT V. ABBOT,
Of Counsel for Plaintiff in Error.

CRIST, SCOTT & PARSHALL, Cooperstown, N. Y., New York Office, 220 Broadway.

IN THE

United States Supreme Court.

TIMOTHY F. PADDELL,
Plaintiff in error,

against

THE CITY OF NEW YORK,
Defendant in error.

REPLYING BRIEF FOR PLAINTIFF IN ERROR.

The complaint alleges that the city taxes more property than exists and that it taxes the plaintiff for more property than he owns. These two allegations are true. The courts below and the opposing counsel do not deny them. They cannot be denied.

Any discussion of the plaintiff's rights which makes a pretense of being adequate to its subject must begin with admitting the truth of these allegations. It must end by proving that to tax more property than exists is to take property by due process of law and by proving that to tax the plaintiff on more property than he owns is to extend to him the equal protection of the laws.

The defendant's brief neither begins by admitting the allegations which must be admitted nor ends by proving the conclusions which must be proved. In a word, it avoids the issue. Except

for a slight and unimportant criticism of the plaintiff's pleading, it contains nothing which is material to the case.

So far as it has any bearing at all, it may be summed up and answered in these short sentences:

The city argues that its system of taxation is just. That is not the point. The question is whether the plaintiff is taxed by due process of law. Again, the city argues that real property is classified as by itself a proper subject of taxation, and that the plaintiff is therefore taxed by the application of a uniform system of assessment. This again is not the point. The question is whether the plaintiff is taxed upon property which he does not own.

* * * * * * *

No further reply to the city's brief is necessary. Out of abundant caution, however, we shall shortly answer the criticisms of our pleading, and then we shall take up some matters which we desire to bring to the attention of this Court in amplification of our principal brief. A consideration of them will greatly clarify the analysis of the taxing process which we have already given.

The Sufficiency of the Complaint.

The city argues that the complaint does not sufficiently present the issues of law which the plaintiff wishes to have decided. These criticisms have not been suggested heretofore and even now are not earnestly pressed. That no stone shall be left unturned, however, we will briefly answer them.

The learned counsel for the city calls attention to the fact that the complaint contains no allegation as to the true value of the property

assessed. He then argues that under the law of the state, the board of taxes and assessments is not required to assess property at its true value, but, under the provisions of the Charter, Section 896, may increase or diminish the assessed valuation as found by the deputy assessors in such manner "*as in its judgment may be just or "necessary for the equalization of taxation.*" From this as a premise he concludes that the complaint does not show any "inequality" between the assessment of the plaintiff's property and other assessments upon the roll. There his argument abruptly stops.

The only meaning which this somewhat obscure contention can have with reference to the plaintiff's rights is that the assessors have accomplished equality by an erroneous valuation, that, in other words, the value which they have given as the value of the whole land is actually only the value of the plaintiff's equity. Thus, if the plaintiff's property were really worth $275,000, then the equity over and above the mortgage indebtedness of $115,000 would be $160,000. If, therefore, the assessors have assessed the land at only $160,000 when it is actually worth $275,000, then, according to the city's contention, they have imposed upon the plaintiff only the burdens which the plaintiff ought to bear.

Is it necessary to answer an argument so absurd as that?

The duty to assess is the duty to ascertain by judicial process, and to declare, true values, and a duty to assess *so as to produce equalization* is not different from the duty to assess. It is not under any conceivable interpretation a duty to determine false values, to determine, that is, by judicial process that the property is not worth what it is actually worth. Even if we should concede, however, such an obviously false inter-

pretation of the statutory provisions, it nevertheless remains true that under the allegations of the complaint the plaintiff has sufficiently pleaded his cause. He alleges that "*no deduction or allowance has been made on account of the mortgages aforesaid*" (Record, page 3). That means that an allowance was denied either directly by deduction of the mortgage or indirectly by erroneous valuation. Under either interpretation of the duty of the board of taxes and assessments, therefore, it is clear from the allegations of the complaint that the plaintiff has been taxed upon more than his equity, and therefore that the complaint is sufficient to present the question of the constitutionality of that method of taxation.

The city also calls attention to the fact that the complaint fails to allege that the plaintiff had no personal property, and fails to allege that he had no opportunity to deduct his mortgage indebtedness from personal property.

This criticism fails to distinguish between assessment and taxation. In order that any deduction can be allowed, there must first be an assessment of property from which the deduction can be made, and the allegation that the plaintiff in error was not "*assessed*" with respect to "*any* personal estate owned by him" (Record, page 4) is an allegation that the assessors in the performance of their official duty found no such property. Now it must be remembered that assessors are judicial officers. In the State of New York, as generally throughout the country, the assessment has "all the force and effect of a judgment" and "cannot be questioned by a collateral proceeding."

U. S. Trust Co. v. The Mayor, 144 N. Y., 488.

Consequently the fact that the assessors in the

performance of their official duty found no property to assess is an adjudication which is conclusive upon both parties to this writ of error that the plaintiff had no such property.

If the complaint had merely alleged that the plaintiff was not *taxed* with respect to any personal property, then it would have been clearly insufficient, because the *tax* is not imposed until after the property is assessed and the debts have been deducted and is merely the imposition of the burden with respect to the *net balance* of personal property and debts as so ascertained, and, therefore, such an allegation would have been quite consistent with the fact of the plaintiff's owning personal property from which the debt had been deducted.

There is a further answer to the city's criticism of the complaint in the fact that there is no statute applicable to the City of New York which permits the deduction of debts from personal property. The case which the defendants cites of

People, ex rel. Cornell Steamboat Co. v. Dederick, 161 N. Y., 195,

relates to a system of taxation which exists outside of the City of New York and does not apply to the system which obtains within the city. As is stated in one of the cases which the learned counsel for the defendant in error himself cites,

People, ex rel., Thompson v. Feitner, 168 N. Y., 441, 449,

"the scheme of assessment and taxation provided "for the City of New York has no similarity to "the general law applicable to the other portions "of the State." The sections of the General Statutes which permit the deduction of debts and which are cited in the *Cornell Steamboat Company* case are sections which prescribe a form of assessment roll which is not used in Greater New York. Consequently on the city's own theory that a de-

duction of debts is not to be allowed except by statutory permission, the Court could no more presume that a deduction of debts was allowed in the case of personalty than it could presume such an allowance in the case of realty, and the allegation that the plaintiff was not assessed for any personal property permits no inference that his debts had been deducted.

Since the defendant in error attaches no importance to the criticisms of the complaint, we may ourselves dismiss them from further consideration, and may proceed to the consideration of those matters which are necessary to complete the argument of our principal brief.

Supplementary Matters.

I.

There is one argument which we expected the learned counsel for the city to present at length, because it was presented below by his predecessor; but for some reason he has omitted it, presumably because he has himself seen its fallacy. Although it is fallacious, it so admirably illustrates the error of the assessment that we shall state it and answer it. It is this:

The plaintiff in error has omitted to allege in his complaint that the holders of the mortgages upon his property were assessed with respect to the mortgages which they hold. Now if they were not assessed, then it may be urged that the fiction of which the plaintiff complains does not in fact exist, inasmuch as the total of property assessed will not in fact exceed the total of the property in existence. This may be illustrated by reference to our illustrative case of the mortgage transaction in realty. If in that illustration the mortgagee were exempted from taxation

on his mortgage it would follow that the state would be collecting taxes only on the $40,000 cash in his hands, and on the $100,000, the value of the land, or on only $140,000 in all. Inasmuch as $140,000 was the true value of the property actually in existence, no fictitious excess of values would appear upon the tax rolls.

It may be observed that precisely the same result would follow if, instead of exempting the *mortgagee* from taxation on his mortgage, the state should exempt *some third person*, X, to an equal amount of $60,000, because in this case the excess which would otherwise be exhibited on the tax rolls would be expunged by the exemption and the total figure of the tax rolls would not exceed the real value of the property in existence.

It is, however, a sorry consolation which such a solution of the problem offers to the mortgagor. It is as if the state should say to him, "You are "right. We have been collecting taxes on more "property than exists. We will amend our error. "We will collect taxes on only so much property "as exists. We will exempt the property of some-"body else." Although the fictitious excess disappears, the wrong is not righted. The mortgagor is still taxed on more than he owns and all that has happened is that somebody else is taxed on less than he owns.

The fact is that the error in the assessment is not actually corrected. It still inheres in the tax rolls. Exemption from taxation necessarily implies the existence of taxable property to be exempted, and the assessors, before they can allow the exemption, must first determine by judicial process that more property exists than actually does exist. The supposed correction of the error which results from the exemption is only a change in an adjudication which is not erroneous and it leaves unchanged an adjudication which is er-

roneous. It is like the forced entry made by a bookkeeper when he cannot make his books exactly balance. In despair of attaining the truth, he finally inserts an item in the balance sheet and does indeed produce an equality between the two sides of it, but he has not corrected the error. It still remains hidden somewhere in an item which is not corrected.

This persistence of the error is illustrated most forcibly by supposing that the exemption is offered to the mortgagor himself. Suppose that the state should permit him to exempt out of his taxable property an amount equal to his mortgage indebtedness. From what property is the exemption to be made? In our illustrative case of the mortgage on land, is the exemption to be made from the assessed value of the land as a whole, or is it to be made only from the assessed value of the equity? The indebtedness amounts to $60,000. If the mortgagor is first assessed for $100,000, the value of the land as a whole, then the exemption will indeed have reduced his taxed property from $100,000 to $40,000, his equity; but then that result is predicated upon the hypothesis, known to be erroneous, that the mortgagor and the mortgagee each own $100,000. In other words, the assessors must first commit the error of judicially determining that there is $200,000 worth of property in existence before the exemption can become effective. If they should assess the mortgagor correctly, for only $40,000 worth of land, and should then allow the exemption, he would not be taxed at all.

The error which persists is the false supposition that an intangible right possesses an independent value of its own, even though to satisfy it there must be a transfer of tangible property. In each case of exemption which we have supposed it is clear that the bond and the land must

be determined to have independent values before the exemption can become available. In other words, exemption is no proper corrective for an originally false assessment. The error must be committed before the exemption can operate, and the exemption does not eliminate it. The balance sheet balances, but it still contains the false entry.

It did not need this analysis to make plain the fact that the mortgagor's constitutional rights cannot be diminished or abrogated by any action which the state may take with reference to the mortgagee. It is clear without any analysis at all that one man's wrongs are not righted by giving privileges to another man.

II.

In our principal brief we contend that since an intangible right which must be satisfied by the transfer of tangible property has no value independent of the property which must be transferred in satisfaction of it, therefore the assessors in determining the question of value must take into account the dependence of the intangible right upon the tangible property and must apportion the real values according to that dependence. It may and should be urged in answer to that contention that the legislature has undoubted power to classify and tax tangible property by itself as one kind of property and similarly to classify and tax intangible property by itself as still another kind of property, and that what the legislature has power to do directly it may do indirectly.

This is the real argument, more accurately stated, which underlies the second point of the city's brief. It is excellently illustrated in the case of

Bell's Gap RR. Co. v. Pennsylvania,
134 U. S., 232,

cited by the defendant in error, where it was held that the State of Pennsylvania could impose a tax of three mills in the dollar upon the face value of bonds issued by the railroad company. The answer to this argument, however, is complete. Granted that the legislature has such a power to classify and tax property, nevertheless the method which it prescribes must conform to the constitutional requirements of due process of law, and those requirements are not obeyed by a statutory requirement that the assessors must find as a fact through a judicial process that which is not a fact. Even if the legislature has the power to tax a bond at the rate of three mills upon each dollar of its face value, it does not have the power to require an assessor to find such a bond to be actually worth a thousand dollars when a due judicial inquiry would develop the fact that it is worth only five hundred dollars. It is the due process of law which is at issue here, and not the constitutional power of the state legislature.

A still better illustration of this distinction may be found in the statutes of the State of New York. Under the Dutch system of manorial holdings the patroon retained the title to all the lands of the manor, and the settlers within the manor were granted only ground leases. After the establishment of the state government in the American colonies this custom was perpetuated, but early in the last century it gave rise to a very serious controversy. In an effort to assist the tenants of the ancient manors of the state, the legislature passed an act by which the rents reserved upon a lease were taxed as personal property to the person entitled to receive them when the term of the lease exceeded twenty-one years. The result

of that statute was that the owner of land was first taxed on the land as land and then taxed again on the lease of the land as personalty.

Tax Law, Section 8.

If by that statute the assessors are not required to find contrary to the fact, if they are only required first to assess the land and afterwards to assess the lease without finding that the lease has a value independent of the land, if, in a word, they are not required to find that the lease and the land together are worth more than the land alone, then that method of taxation does not offend the requirement of due process of law. If, however, the statute does require the assessors to find in the course of the performance of their judicial duty that the values which the landlord owns consist first of the value of the land and next of the value of the lease as an independent value, so that they are required to find that the lease and the land together are worth more than the land alone, then clearly the statute requires the assessors to find as a fact that which is not a fact and violates the provisions of the Fourteenth Amendment, which require due process of law in the taking of property.

Still again, the state has undoubted power to take lands by right of eminent domain; but in the exercise of that right, it must proceed by due process of law and cannot take land without due notice to the owner and without an opportunity to him to be heard on the question of compensation.

It is not true that the state may do indirectly what it may not do directly. Because it has power to tax tangible property and intangible rights separately on their face value, it does not have the power to require a judicial officer in the performance of his judicial duties to find that they have separate values when the fact is that the value of one depends upon the value of the other.

We may conclude the discussion of this point by adverting to the assertion of the learned counsel for the city that the "classification" which justifies the present assessment is "between real property and personal property." The simple answer to it is that it is not true, either as matter of fact or as matter of law. There is no statute enacted by the legislature and there is no decision promulgated by any judicial officer which is, or can be, cited in support of it. For all the purposes of taxation, under the laws of New York, both real and personal property fall into one undivided class. Even, therefore, if the state had the power to discriminate between the two kinds of property, it has signally omitted to exercise it, and the constitutionality of the assessment under review must be determined in the light of that omission.

III.

The court of first instance in this cause insists that the taxation of real property is "regardless of ownership or terms of ownership" (Record, page 10). The counsel for the city in his brief, at page 11, says: "In the City of New York real property is assessed irrespective of its ownership."

It is unquestionable that these two statements of the law represent the personal views of the great majority of the members of the bar in our city, and perhaps elsewhere, but how such views can originate is a mystery. They are not merely erroneous: they are in actual conflict with the provisions of every statute which relates to the question, and they are opposed to every judicial decision which has ever attempted to determine the rights of the parties under those provisions—except, indeed, the decision here under review. In

fact they are no more than a legal superstition, as unfounded as the current beliefs in ghosts and hobgoblins.

We shall not lead the court into the details of the state law on this matter. We will content ourselves with showing that taxation of property without regard to ownership or the terms of ownership is not merely not an actual mode of taxation, but is a physical impossibility.

The state cannot tax land which is not owned, for the simple reason that there is nobody to pay the tax. The state might, indeed, assert ownership over the property and sell it and thus derive a revenue from it, but that revenue would not be a tax. Again, for precisely the same reason, the state cannot tax land which it owns itself. It may sell the land and derive a revenue from it, but the revenue so derived is not the proceeds of taxation. In other words, *private ownership* is the absolute and unavoidable condition precedent of every so-called tax on land.

Again, a tax is the contribution of an individual citizen to the expenses of the state, and in order that there should be a tax, some citizen must pay it, and to compel a citizen to pay a tax without regard to his property is a physical impossibility. For example, the assessed value of the land lying within the boundaries of the City of New York for the year 1907 was $6,240,000,000, from which the city derived a revenue from taxation at the rate of $15 in $1,000, or a total of $93,600,000. It would have been physically impossible for the city to declare that it would impose on that land, regardless of ownership, a tax burden of $93,600,000; that no citizen would be taxed; but that it would seize and sell various parcels of land until that amount of revenue was paid into the city treasury. The net result of such an operation would be that the *citizens*

whose land was seized would pay the tax and would pay it *by virtue of their ownership,* and the *land* that was not seized would not pay any tax at all.

So far as the conception of taxation regardless of ownership has any basis at all, it lies in the supposition that the city may apportion the total revenue to be raised by the tax on land among the different parcels of land according to their value, and that it need not concern itself any further with the question of ownership. Even so, however, the city does not attain to taxation regardless of ownership, for the parcels themselves are, and in the nature of things must be, *determined by the lines of ownership.*

The only possible method of which the city can tax land is to impose upon each owner of land a proportion of the total burden determined by the ratio which the assessed value of his particular land bears to the assessed value of all the land in the city. That, in fact, is the method which is pursued not only in the City of New York, but throughout the state and throughout the country generally. And so every tax roll, whether in the city or out of it, bears the name of the owner of the land, and somewhere in the law there is a provision to the effect that different interests in land are to be taxed to the different owners. Thus in the City of New York, by Section 889 of the Greater New York Charter, the deputy tax commissioners are required to state the names of the *owners* of land and by Section 920 of the Charter, if a sum of money is taxed "in gross" upon any particular lot of land in which individuals have divided or undivided interests, any individual may pay the tax upon his interest and require that interest to be relieved of any further lien.

It is, of course, perfectly true that any citizen may, by error, be assessed for taxes with respect

to property that he does not own, and that in default of payment the state can physically take the property from the true owner. No state, however, has attempted any such method of taxation as that, and, if it were deliberately attempted, in other words, if any man were intentionally assessed with respect to property which he did not own, or if the state should intentionally attempt to take one man's property for another man's taxes, then the statute or the law embodying that attempt would be clearly unconstitutional. There is no authority on this point. The mere fact that there is no authority is the best proof that the proposition is indisputable.

IV.

Since writing the principal brief, we have discovered another case in the state courts in which the attempt has been made by the mortgagor to escape taxation on the mortgaged interest.

Morrison v. Manchester, 58 N. H.. 538.

The decision was against the mortgagor. There are thus three cases in which the question of the mortgagor's right has been considered in a suit in which he has been the party plaintiff. Two of these were in the state court and one was in the Federal court. In the two state courts the decision was adverse to the mortgagor,

Lick v. Austin, 43 Cal., 590,

Morrison v. Manchester, 58 N. H., 538,

and in the Federal court the decision was in his favor,

County of Santa Clara v. So. Pac. RR. Co., 18 Fed. Rep., 385.

See also

County of San Mateo v. So. Pac. RR. Co., 13 Fed. Rep., 722.

These three cases are, we believe, all the authorities directly in point.

As to the California case, we have already explained the grounds of the decision in our principal brief. A word should be said, however, as to the New Hampshire case. The contention of the plaintiff, as appears by his briefs, which are fully reported, was that the mortgagor owned only the equity and that therefore he was taxed on property which he did not own. This is precisely one of the contentions which we advance in this Court. The ground of the decision, however, is to be found in this extract from the opinion, at page 553:

> "If the mortgaged land were taxed to "the mortgagee without recourse to the "mortgagor, *money at interest would be "exempted for the benefit of the mort-"gagor.* The land might as well be ex-"empted for his benefit as the money at "interest. Taxing the land to the mort-"gagee, and exempting the money at in-"terest, would be a futile and frivolous at-"tempt to conceal the mortgagor's sub-"sidy."

The fiction involved in the assessment of the mortgagor for the whole value of the land was not presented to for the consideration of the New Hampshire court, and therefore it failed to grasp the whole situation. It rested under the belief that *existing taxable property would be exempted* for the benefit of the mortgagor and to the detriment of his fellow citizens (see pp. 549-550). That belief determined the opinion. The fact, however, as this Court will well understand, is that so far from there being an exemption of taxation upon *existing property*, there will be a cessation of taxation upon *non-existing* property. This is a sufficient answer to the New Hampshire case. If any further answer is required, we will ask this Court to compare the analysis of the

mortgage transaction given by the New Hampshire judge, at pages 552 and 553 of his opinion, with the analysis which was given by Judge Sawyer in the *Santa Clara* case and quoted at page 49 of our principal brief. The conclusion of this Court must be that both the weight of reason and the weight of authority are with the Federal court.

V.

A word should be said as to the actual operation of the exclusion of indebtedness in ascertaining the taxable property of any individual.

The learned counsel for the city in his brief puts the case of a debtor assessed for property in two jurisdictions and asks: "From which assessment shall the deduction of a debt be allowed? Or shall it be twice deducted?" This question illustrates the complete misapprehension under which he rests as to the effect of deducting debts. *The real danger is not that debts may be twice deducted by the debtor, but that they may be twice taxed to the creditor.*

The debtor cannot ask for a deduction of a debt without giving the state the opportunity and the right, under the case of the

Metropolitan Life Ins. Co. v. New Orleans, 205 U. S., 395,

to ascertain the name of the creditor and therefore to tax the creditor as for property within its borders. If, therefore, a debtor assessed for property in New York and also in New Jersey should attempt to deduct his debts in both jurisdictions, he would afford both the State of New York and the State of New Jersey an opportunity to tax the creditor. Consequently there would be a greater danger of double taxation of the creditor than there would be of insufficient taxation of the debtor.

The other question which the learned counsel for the city asks in his brief, as to the case of indebtedness incurred by owners of real property having only restricted estates in the property, as for example of tenant for life and remainderman, can be answered at once. The debt of a remainderman cannot be deducted from the interest of a life tenant—an answer so obvious that it is a little strange that so learned an advocate should have remained in doubt long enough to commit his doubt to the printed page.

In Conclusion.

"The difficulties of administration, the un-
"avoidable errors, and the consequent inequali-
"ties of taxation which must result * * * are
"apparently overlooked by the learned counsel
"for the plaintiff." Thus writes the learned counsel for the city. He writes with unaccustomed accuracy. We do overlook the consequences of our contention. We are not concerned with consequences. We are only concerned to see, on behalf of our client, that the constitution of the United States, the supreme law of the land, is obeyed. For the rest, we remain secure in the belief that, even if the present methods are unconstitutional, there is yet possible a method which shall take no man's property without due process of law, and which shall deny to no man the equal protection of the laws.

Dated, New York, April 15th, 1908.

EVERETT V. ABBOT,
of counsel.

SUPPLEMENTARY APPENDIX

of statutes relating to the levying and collection of taxes in the State of New York.

The Tax Law.

8. Place of taxation of property of residents.

* * * * Rents reserved in any lease in fee or for one or more lives or for a term more than twenty-one years and chargeable upon real property within the state, shall be taxable to the person entitled to receive the same, as personal property in the tax district where such real property is situated, and for the purpose of the taxation thereof such person is to be deemed a resident of such tax district. * * * *

The Greater New York Charter.

When assessed valuation may be increased or diminished.

§896. The board of taxes and assessments may increase at any time before the first of April in each year, or may diminish at any time before the closing of the books of "annual record" on the first day of April in each year, the assessed valuation of any real or personal estate of any individual or corporation, as in its judgment may be just or necessary for the equalization of taxation; but it shall not increase such valuations of the property of any individual or corporation after said books are opened for correction and review, except upon notice given to the individual or corporation affected by such increase at least ten days before the fifteenth day of April in each year.

Undivided parts of taxes; payment of.

§920. If a sum of money in gross has been or shall be taxed upon any lands or premises, any person or persons claiming any divided or undivided part thereof may pay such part of the sum of money so taxed, also of the interest and charges due or charged thereon, as the said comptroller may deem to be just and equitable; and the remainder of the sum of money so taxed, together with the interest and charges, shall be a lien upon the residue of the land and premises only, which residue may be sold to satisfy the residue of such tax, interest or charges, in the same manner as though the residue of said tax had been imposed upon the residue of said lands or premises.

FILED
MAY 20 1908
JAMES H. McKENNEY,
CLERK

No. 42.

In the Supreme Court of the United States.

ON WRIT OF ERROR

TO THE

SUPREME COURT OF THE STATE OF NEW YORK.

TIMOTHY F. PADDELL,
Plaintiff-in-Error,

against

THE CITY OF NEW YORK,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

FRANCIS K. PENDLETON,
Corporation Counsel of The City of New York,
Attorney for Defendant-in-Error.

DAVID RUMSEY,
Of Counsel.

NEW YORK:
MARTIN B. BROWN CO., PRINTERS AND STATIONERS,
Nos. 49 TO 57 PARK PLACE.
1908.

In the Supreme Court of the United States.

TIMOTHY F. PADDELL,
Plaintiff in Error,
against
THE CITY OF NEW YORK,
Defendant in Error.

Writ of Error to the Supreme Court of the State of New York.

Brief for Defendant in Error.

Statement.

The system of taxation which obtains in the State of New York provides for an *ad valorum* taxation of real property and of personal property. Personal property for taxation includes credits or "debts due from solvent debtors," whether secured or unsecured and whether real property is or is not pledged, by mortgage or otherwise, as collateral security for the payment of the debt. Debts of the taxpayer may be offset against an assessment of his personal property (Peo. *ex rel.* Cornell Steam Boat Company *vs.* Dederick, 161 N. Y., 195), even though they were incurred in the purchase of real property (See Tax Law, section 6); but no personal indebtedness of the owner of real property can be offset against an assessment of his land.

This cause is presented upon demurrer to the complaint.

It is alleged in the complaint that the plaintiff's land situated in New York will be assessed for $160,000 by the consummation of the process of taxation already begun; and that no deduction has been made from the assessors' valuation of the property at that sum, although the plaintiff was indebted on bonds in the sum of $115,000, secured by mortgage liens upon the real property (folios 3 to 12). It is also alleged that the plaintiff has not been assessed for personal property taxes for the same year (fol. 8). There is a suggested inference that the lack of a personal tax shows that the plaintiff had no personal property. Yet it would seem that the absence of a personal tax might be due to the fact that the assessors' inquiry disclosed taxable personal property against which the entire mortgage indebtedness or a substantial portion of it was offset.

It should also be observed that the complaint contains no allegation of the value of the real property nor the relation between the assessment and the true value of the real estate assessed.

It is stated that a deputy tax commissioner of the defendant has sworn to a valuation of the property in his judgment at $160,000. But the plea of one man's appraisal is not a plea of the fact of value. By the law of New York the scope and meaning of the sworn statement of assessors is explained and modified. Both the Legislature and the courts have recognized the probability of error in human judgment in determining that most elusive of all facts, the fact of value; and have sanctioned an extreme conservatism in valuation of real property by which assessors are supported in appraising at a percentage substantially less than full value.

Thus in Peo. *ex rel.* Equitable Gas Light Company *vs.* Barker (144 N. Y., 94, at 99), it is said:

> "The statement contained nothing in terms upon the subject of the actual value of the relator's real

estate. It stated the assessed value only. The theory of the statute is that real estate for the purpose of taxation shall be assessed at its full value. The rule formulated in the Revised Statutes is that 'all real and personal estate shall be estimated by the assessors at its just and full value, as they would appraise the same in payment of a just debt due from a solvent debtor' (1 Rev. St., sec. 17; Laws 1851, chap. 176), and under the Consolidation Act (sec. 814) it is to be assessed 'at the sum for which such property under ordinary circumstances would sell.' But it is well known that this duty cast upon assessors is seldom performed, and that the taxation of real estate throughout the State is generally upon an assessment which represents but part of its actual value. Assessment at the full value is the exception and not the rule. If the ratio between the actual value and the value as assessed is uniform, no inequality of taxation would result, except, perhaps, in the distribution of the tax as between real and personal property, assuming that the assessors do not apply the same ratio in assessing personalty. Real and personal property are to be separately assessed. In case of an individual assessed for both, if the realty be undervalued, the loss cannot be made up by adding it to the assessment of the personalty. But the law governing the taxation of corporations (Laws of 1857, chap. 456) requires the valuation of the whole property owned by the corporation, whether real or personal, or both, in order to ascertain the capital which is the subject of taxation (People *ex rel.* Union Trust Co. *vs.* Coleman, 126 N. Y., 433), and from the aggregate is to be deducted the assessed value of the real estate, and the balance is the capital subject to assessment, after deducting debts and any exemptions allowed by law. In assessing the capital of a corporation for the purpose of taxation, it is immaterial in which descrip-

> tion of property the capital may be invested. Both its real and personal property are to be considered and valued, and from the aggregate value is to be deducted the assessed value of the real estate, for the obvious reason that to that extent a separate taxation is provided (People *ex rel.* Eq. Gas Light Co. *vs.* Barker *et al.*, 66 Hun, 21; aff'd in this court in 137 N. Y., 544)."

Under the system of taxation in New York there is no necessary relation between the sworn statement of the "judgment" of the Deputy Tax Commissioner, referred to in the complaint (Record, fol. 5) and the assessment as levied. The law of New York imposes the duty of levying assessments, not upon the Deputy Tax Commissioners, but upon the Tax Commissioners (Peo. *ex rel.* Thompson *vs.* Feitner, 168 N. Y., 441). The Deputies acting under the authority of section 889 of the Greater New York Charter (chapter 387, Laws of 1897, as amended by chapter 454 of the Laws of 1903, quoted plaintiff's brief, page 54), assess property as the act, and subject to the control of the Tax Commissioners. The Tax Commissioners are charged with the duty to assess (Peo. *ex rel.* Thompson *vs.* Feitner, *supra*), and the law of New York does not compel them to assess at full value, or to concur in the judgment of their deputies as to the sum for which property would sell. The Tax Commissioners are required to hear complaints, and "if in their judgment the assessment is erroneous they shall cause the same to be corrected" (Greater New York Charter, *supra*, section 895). The correction to which a taxpayer is entitled, is not merely a reduction to the true value of the property, but a further reduction to the ratio of assessment to value prevailing in the assessment of other property upon the assessment roll (Peo. *ex rel.* Warren *vs.* Carter, 109 N. Y., 576; Peo. *ex rel.* Stewart *vs.* Feitner, 95 App. Div., 481; Greater New York Charter, sec. 906).

The Tax Commissioners are expressly authorized, upon their own motion, to equalize assessments, that is to say, adjust the ratio of assessment to value so as to become uniform (Greater New York Charter, sec. 896). These changes must not result in inequality of assessment as between properties, but neither a court of law nor a court of equity will disturb assessments of real property unless it is made to appear that the complainant's property has been assessed at more than its value or more than the prevailing ratio of assessment to value (Greater New York Charter, sec. 906; People *ex rel.* Warren *vs.* Carter, *supra;* Mercantile National Bank *vs.* The Mayor, 172 N. Y., 35).

The changes in valuation which the Tax Commissioners make to secure what in their judgment is a uniform and impartial assessment of all the property within their jurisdiction, are made without any change whatever in the oath of their deputy and without the addition of any oath made by them.

Thus in New York the oath of the deputy is the only oath which is required to be made. Yet that oath only purports to represent an expression of the individual judgment of the deputy making it, not an official finding as to the fact of value. A plea that the deputy exercised his judgment as to the value of the property is not a plea that the true value was the amount of his appraisal. Particularly is this apparent when in the same pleading the plaintiff alleges that the oath to the assessment roll is "false in fact" (Record, fol. 9).

In a jurisdiction where assessments are not necessarily made at full value, the amount of the assessment cannot be assumed to represent the value of the property assessed. The assessment at $160,000 may represent only a percentage of the value of the property, and the mere assertion, by the complaint, that a particular deduction on account of mortgage indebtedness was not allowed

does not show a cause of action, or a case for equitable intervention. That fact may be admitted and yet the Court is without sufficient data to justify a reduction of the assessment, assuming the truth of the other allegations of the pleading. For the fact remains that there may be no inequality as between this assessment and the other assessments upon the roll. The same ratio of assessment to value may exist, and in the absence of a plea as to what was the true value of the plaintiff's property, it is impossible to say what was the ratio of assessment applied in the assessment of his property.

Assuming, however, that the complaint can be viewed as presenting the question whether real property may be assessed at its value although the title is incumbered by a mortgage executed by the owner at the time of assessment, the following argument is presented on behalf of the defendant in error:

Argument.

I.

The New York system of taxation, restricting the deduction of debts to personal property, is just, and the deduction of bonded indebtedness from mortgaged real property would create inequality of taxation, not prevent it.

The plaintiff's argument is based upon an exceptional state of facts, and upon an assumption which seems unwarranted by the admitted allegations of the complaint. His argument assumes that the plaintiff had

no taxable personal property against which the mortgaged indebtedness could be or had been offset. The facts pleaded only go to the extent of alleging that the plaintiff was not assessed for personal property (Record, fol. 8). If the plaintiff had taxable personal property against which the indebtedness on bond and mortgage could have been offset, then he has not been prejudiced by a refusal to allow the debt as an offset against an assessment of real property, and presents no case justifying equitable relief or a consideration of any further questions constitutional or otherwise.

If the plaintiff relies upon the proposition that the lack of a personal property assessment shows that he had no taxable personal property because the action of a public officer is presumed to be correct, we answer that the force of that presumption goes farther, and is consistent with complete knowledge by the assessors that the plaintiff possessed taxable property, but was entitled to deductions from the value of that property for exemptions or indebtedness, including the indebtedness of $115,000 on bond and mortgage, leaving no balance of taxable personalty, and thereby justifying their action in imposing no personal property assessment against the plaintiff.

But assuming, for the purpose of discussing the plaintiff's contention, that the plaintiff had no taxable personal property whatever, and for that reason could not deduct the debt which he owed on bond and mortgage, it seems that a statute according the right to deduct indebtedness from the value of the mortgaged real property would violate essential theories of just taxation and would produce inequality.

The transaction to which the system of taxation must be made to apply is essentially a loan of money by one person to another. A borrows of B and agrees to repay the loan at a time stated. The agreement is a personal obligation to pay a sum of money at a certain time. It is

a credit or a personal property asset in the hands of B. If the agreement be performed in accordance with its terms, then on the day of maturity of the loan A will pay to B a sum of money, thereby substituting for certain personal assets of B, namely, the credit, certain other personal property, namely, the money. The transaction is one involving only personal property. The legal presumption is that the agreement will be performed according to its terms. There is no presumption as to the specific source from which the debtor will secure the money to pay his debt. In the usual case the debt would be paid by refunding money of the creditor temporarily in the possession of the debtor. If, however, the debtor determines in the adjustment of his own affairs, to secure the money from some other source, such as a sale of his real property, that does not transform the credit in the hands of the creditor from personal property to real property. Nor, indeed, is it ever practicable to attempt to say from what source a debt will be paid, for that must depend upon the exigencies of the debtor's affairs at the time of payment, and his selection of the source from which to pay the money is subject to change with changes in his financial condition.

It therefore seems that as the credit is always personal property, the debt is naturally deductible from personal property assessed.

The only theory upon which debts are deducted from taxable property is that the property of one really belongs to another, and should therefore be omitted from the taxable assets of one and added to the taxable assets of the other. So when we find an obligation to transfer money from one to another, constituting personal property owned by the obligee, namely, the credit, the obligation to pay the money is naturally to be considered only as in diminution of the personal property or money otherwise taxable against the debtor.

This is in no way changed by the fact that the debtor has made a collateral agreement pledging real property as security for the faithful performance of his agreement to deliver personal property (namely, money) at the time of maturity of his bond. It must be assumed that the debtor will pay in accordance with the terms of his agreement. The conclusion follows that the debt will not be paid by enforcement of the lien, for that could be done only after default. When the debt is paid (by transferring money to the creditor as agreed) the real property is released and has no further connection with the transaction.

A system of taxation must be adjusted on broad lines and based on general conditions. With every desire on the part of those who establish it to secure equal taxation, equality can be only approximate.

The Legislature of New York has accorded the privilege of deducting debts as against assessments of personal property, but not as against real property.

This system operates with unquestioned equity and justice in the usual case where the debtor has the money which he has agreed to pay. It is criticised in this case, where the plaintiff comes into court insisting that he can not pay his debt as he has agreed, but that the debt which he asks to be offset against the value of real property must be satisfied by foreclosure and sale of the collateral security. He says that he has agreed to pay his bond in money at its maturity. But the obligation will not be fulfilled, and the collateral security must be sold to satisfy his intended default. He says that he has bought property which he cannot pay for, and assumed a contract which he cannot perform. It is said by the plaintiff that to tax the land on the theory that the plaintiff would pay for it as he has agreed is "taxation by fiction." The phrase is without precise legal signification. But if a fiction be involved in the transaction

pleaded, it seems to originate in the plaintiff's act, in agreeing to do that which he cannot perform; in purchasing property which he has not the money to pay for; in bringing into existence a fictitious credit founded on an intended breach of contract. There may be no wrong, legal or ethical, involved in the transaction which the plaintiff alleges. He may have such a reasonable expectation of securing the money with which to meet his obligation as would justify his act, or his neglect in spending or losing the proceeds of the loan. His lack of the necessary funds may be due to misfortune, though there is nothing in the record to suggest it. If the mortgage was given for purchase money he may be justified in the speculation, though it involves a purchase of that which he cannot pay for. But he has created the anomalous situation. He cannot be heard to say that his action was not taken with knowledge of the effect which it would have on his obligation to pay taxes, apparent from a perusal of existing general laws, and he is in no position to complain of the inequality of an existing general system of taxation, which operates impartially when applied to normal conditions.

We assume the plaintiff's proposition is that all debts of an owner of real property should, in the interest of accurate assessment, be deductible from the value of real property. For if the assets of a taxpayer consist of real estate only, valued at $160,000, and he is indebted upon an unsecured note for $115,000, there is the same probability that the real property will be sold for the debt, as if the debt were secured by a collateral mortgage. The difference in the method of taking the property is unimportant. The result is the same whether accomplished by a general judgment and execution or by a decree of foreclosure.

The difficulties of administration, the unavoidable errors, and the consequent inequalities of taxation which

must result from such a law, are apparently overlooked by the learned counsel for the plaintiff.

In the City of New York real property is assessed irrespective of its ownership. It is not feasible to authenticate the title and ownership of real estate as of the assessment date, on peril of invalidating the taxation of the property. Changes of ownership shortly prior to the time of assessment could not be found by the assessors, even if the transfers were recorded, and the changes of public record. But ownership of land may be transferred without record of the deed, and a statutory requirement that debts should be deducted from the value of real property would apply to ownership by deeds unrecorded as well as deeds recorded. A record ownership of property would give an apparent right to the deduction of indebtedness of the record owner, yet reliance on the record would result in many errors. In a vast number of cases lands are owned by aliens or residents of other States or residents of other cities or villages in the State of New York. In such cases the personal property of the owner is assessed in one jurisdiction while the land is assessed in another. From which assessment shall the deduction of a debt be allowed? Or shall it be twice deducted? In many cases indebtedness is incurred by an owner of real property having only a restricted estate in the property. Shall the debts of a remainderman be offset against the value of real property assessed to the life tenant as owner? Or shall the debts of both life tenant and remainderman be deducted? Assume the case of real property held in trust for payment of the income to two persons for life, the trust to terminate at their death and the property to go then to several persons in undivided ownership; who is the owner whose debts should be deducted from the value of the property in the interest of equality of taxation? Such cases of impossibility of proper administration might be suggested to an almost unlimited number. An equitable system of taxation requires that

mortgage indebtedness like all other indebtedness, shall be recognized as a transfer of personal property with an agreement to return personal property to the true owner; that an attempt to extend the privilege of deducting debts would produce more inequality of taxation than it would prevent, and that men who buy property by the means of assuming obligations which they cannot perform should be left to pay the taxes to which their unusual transactions subjected them—taxes which could have been avoided by the purchase of only so much real property as the taxpayer had money to pay for.

II.

No discrimination in the burden of taxation is shown to exist as between persons similarly situated; and a system of taxation by which an equal burden is imposed upon all in the same class is not repugnant to the Constitution of the United States.

It is unquestioned that all owners of real property in New York are taxed by the application of a uniform system of assessment. There is no discrimination. The classification is between real property and personal property. All owners of real estate are treated alike. None can deduct his debts from that class of property. All citizens know this is the law, and transfers of property have been made for at least a century with knowledge of its existence.

The proposition that such a system involves no violation of the Fourteenth Amendment of the Constitution

of the United States is demonstrated by many decisions of this Court, of which the following are representative:

In Merchants' Bank *vs.* Pennsylvania (167 U. S., at 464) the scope of the limitations of the Fourteenth Amendment upon the taxing power were discussed in the following language:

> "It was well said by Mr. Justice Williams, speaking for the Supreme Court of Pennsylvania, in the opinion in the present case: 'The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand.' Indeed, this whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in Bell's Gap Railroad *vs.* Pennsylvania, 134 U. S., 232, 237, in which case Mr. Justice Bradley, speaking for the court, said:
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> "'The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; *it may tax real estate and personal property in a different manner;* it may tax visible property only, and not tax securities for payment of money; *it may allow deductions for indebtedness, or not allow them.* . . . We

think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction it would not only supercede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interest of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt.' See also Jennings *vs.* Coal Ridge Improvement Co., 147 U. S., 147."

In the recent case of Michigan Central Railroad *vs.* Powers (201 U. S., 245) it appeared that a statute of Michigan had classified certain of the property owned by railroad companies, that is to say, the franchises, personal property and such of their real property as was used in connection with the franchises, and subjected this class of property to a special method of valuation and assessment and also to a different rate of taxation, namely, the average rate of taxation of the several taxing districts in the State.

In deciding that the statute did not violate the Constitution of the United States, this Court said:

"That, so far as the restraints of the Federal Constitution are concerned, it is within the power of a State to separate a particular class of property, subject it to assessment and taxation in a mode and at a rate different from that imposed upon other property, and apply the proceeds to State rather than to local purposes is not open to question."

In Field *vs.* Barber Asphalt Co. (194 U. S., 618) it was said in the opinion of this court, by Mr. Justice Day (page 621):

> "It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. Kentucky Railroad Tax Cases, 115 U. S., 321; Hayes *vs.* Missouri, 120 U. S., 68; Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 283; Gulf, Colorado & Santa Fe Railroad *vs.* Ellis, 165 U. S., 150."

In Magoun *vs.* Illinois Trust and Savings Bank (170 U. S., at 295), it was said:

> "And so Mr. Justice Miller, speaking for the Court in Davidson *vs.* New Orleans, 96 U. S., 97, 105, said: The Federal Constitution imposes no restraints on the State in regard to unequal taxation.
>
> "The Court, through Mr. Justice Lamar, in Pacific Express Co. *vs.* Seibert, 142 U. S., 339, was equally emphatic. He said on page 351: 'This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for varying its burdens or from being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms, and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and

equality in taxation and of a just adaptation of property to its burdens.' And it was said in Merchants' Bank *vs.* Pennsylvania, 167 U. S., 461: 'Indeed, this whole argument of a right under the Federal Constitution to challenge the tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in Bell's Gap Railroad *vs.* Pennsylvania.'

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind we can solve the questions in controversy."

In Davidson *vs.* New Orleans (96 U. S., 97, at 104), certain of the limitations upon the scope of the Fourteenth Amendment as applied to taxation were stated in the following language of Mr. Justice Miller:

"As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition as applicable to the case before us:

"That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate

to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property, without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State Constitution against unequal taxation, but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject, in immediate juxtaposition in the Fifth Amendment with the one we are construing was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in Loan Association *vs.* Topeka (20 Wall., 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of this State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice in Kennard *vs.* Morgan (92 U. S., 480), and, in substance, repeated at the present time in McMillan *vs.* Anderson (95 Id., 37)."

This statement was quoted with approval in Hagar *vs.* Reclamation District No. 108 (111 U. S., 701, at 711).

In Kentucky Railroad cases (115 U. S., 321) the statute drawn in question imposed a different method of

appraisal upon railroad companies from that which applied to other property owners (115 U. S., at 336-337). It defined all of the property owned by a railroad company to be "real estate," and yet applied a distinct method of valuing the so-called "real estate" of the railroad company, different from the method of valuing other real property.

This Court held that the Constitution was not thereby violated, for a classification of property and an application of different methods of assessment to the distinct classes was within the power of the Legislature; and uniformity of treatment of all persons within the same class was the uniformity which is commanded by the Constitution.

In so deciding this Court said:

> "But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the Legislature has seen fit to impose.
>
> "So, the fact that the Legislature has chosen to call a railroad, for purposes of taxation, real estate, does

not identify it with farming lands and town lots, in such a sense as imperatively to require the employment of the same machinery and methods for all, in the process of valuation for purposes of taxation. Calling them by the same name does not obliterate the essential differences between them, and accordingly, it is not insisted on in argument, as an objection to the system, that a railroad running through several counties is valued and taxed as a unit and by a special board organized for that purpose, while other real estate is valued in each county by assessors."

It is argued for the plaintiff that the decisions of this Court are not inconsistent with the proposition that the Constitution of the United States is violated by a State statute authorizing the taxation of property which is not in existence. We deem it unnecessary to discuss this contention because a decision of the question could have no bearing on the determination of this case. The property assessed was tangible real property, of a conceded value equal to the amount of the assessment. The question presented is whether the State has a right to assess existing property at its value, or whether an allowance or deduction from that value must be made because a part of the property or a portion of its value may pass into the ownership of another in satisfaction of an existing contractual obligation which may involve a future transfer of the property and a loss to the present owner of a part of the value of the land.

But the property taxed is unquestionably in existence, and the plaintiff's claim, when analyzed, amounts to a contention that it was excessively valued.

No assessment of personal property is involved in the case.

In Bell's Gap Railroad Company *vs.* Pennsylvania (134 U. S., 232) a State statute authorizing an assessment upon the nominal or face value of bonds was held

to involve no violation of the Constitution of the United States. It was said that the securities in question were presumably worth their face value, but as an alternative ground of decision it was held that, assuming the contrary, the assessment of the bonds at a uniform fixed valuation did not violate the Constitution (see p. 237).

To the same extent, therefore, that the case at bar involves an assessment "of property not in existence," the question was presented and decided by this Court in the Bell's Gap case.

If a State has power to assess a bond of a nominal value of $1,000 at that sum, although its market price may be only $900, then a State may assess real estate at its market value, although the value of the property to the owner, viewed in connection with his contractual obligations by which a lien has been imposed upon the property, may be reduced to the extent of the amount of the lien.

If there be taxation of "property not in existence" in the one case, the same is true of the other.

If such taxation be valid in the one case, it is equally valid in the other.

We respectfully submit that the power of the State of New York to continue the system of taxation of real estate which has been in existence since the State was created, permitted by its Constitution and sanctioned by its Legislature, should be sustained, and that the judgment under review should be affirmed.

Dated March, 1908.

FRANCIS K. PENDLETON,
Corporation Counsel of The City of New York,
Attorney for Defendant in Error.

DAVID RUMSEY,
Of Counsel.

PADDELL *v.* CITY OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 42. Argued December 7, 1908.—Decided December 21, 1908.

Long settled habits of the community play an important part in determining questions of constitutional law and the fact that a method of taxation was in force for many years from a time antedating the adoption of the Fourteenth Amendment is a reason for not considering that it was overthrown thereby.

Notwithstanding the due process clause of the Fourteenth Amendment land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation either of the land or of the owner's personal property.

In New York a tax on land operates *in rem*, at least without regard to the interests of different persons in the land.

A constitution cannot be carried out with mathematical nicety to logical extremes.

Quære and not decided, whether one disputing only the amount of a tax has any remedy except proceedings for an abatement.

187 New York, 552, affirmed.

THE facts are stated in the opinion.

Mr. Everett V. Abbott for plaintiff in error:

The general property tax, as customarily administered in this country, involves fictitious values, that is, of alleged values having no existence whatever. 1 Cooley Taxation, 1st ed., 159; 2d ed., 220; 3d ed., 387; Seligman, Taxation, 1st ed. (1895), 101; Wells, Theory and Practice of Taxation (1900), 474. Such taxation by fiction is unconstitutional. The fiction disappears, whenever a deduction is allowed, to the extent of the amount of the deduction; but when the deduction is not allowed the fiction is indubitably established. For that reason the plaintiff in error alleged that he was not assessed for any personal property.

A process whereby the State takes the property of its cit-

izens upon an official oath as to values which is false in fact is not due process of law.

The question herein involved has never been directly decided by this court. The nearest approach to a decision that taxation by fiction is unconstitutional is to be found in cases that relate, not to fiction of fact, but to fiction of law, and in those cases this court has refused to allow the fiction to be employed. See *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395.

If the plaintiff in error is taxed upon more property than he owns, then he is taxed upon property which somebody else owns, and therefore he does not receive the equal protection of the laws. The right of the mortgagee is a legal interest in the land itself. *United States* v. *Title Ins. Co.*, 193 U. S. 651; *Savings Society* v. *Multnomah Co.*, 169 U. S. 421. The interest of the mortgagor is limited to that which remains over and above the legal interest of the mortgagee, the so-called equity. *Everson* v. *McMullen*, 113 N. Y. 293; *Weber Piano Co.* v. *Wells*, 180 N. Y. 62; *Union Trust Co.* v. *Coleman*, 126 N. Y. 433.

Mr. David Rumsey, with whom *Mr. Francis R. Pendleton* was on the brief, for defendant in error:

The New York system of taxation, restricting deduction of debts to personal property, is just; deducting bonded indebtedness from mortgaged realty would create, not prevent, inequality of taxation. No discrimination in the burden of taxation is shown as between persons similarly situated; and a system of taxation by which an equal burden is imposed upon all in the same class is not repugnant to the Constitution of the United States. *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 464; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 295; *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Kentucky R. R. Cases*, 115 U. S. 321; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to prevent the City of New York from completing the levy of a tax and thereby creating a cloud upon the plaintiff's title. The plaintiff owns lots numbered 592, 594 and 596 on Seventh avenue, subject to mortgages for $70,000 and $45,000, given by him. The premises have been valued, as the first step toward taxation, at $160,000, and it is alleged upon information and belief that this valuation makes no deduction for the mortgages. The ground of the bill, so far as it is before us, is that the tax if completed will be contrary to the Fourteenth Amendment. Some criticism might be made and was made on the form of the allegations, but we will take them as presenting what we believe they were intended to present, the question whether, consistently with the Constitution of the United States, a man owning land subject to a mortgage can be taxed for the full value of the land, while at the same time the mortgage debt is not deducted from his personal estate. A demurrer to the bill was sustained by the courts below.

The plaintiff has many difficulties in his way. In the first place the mode of taxation is of long standing, and upon questions of constitutional law the long settled habits of the community play a part as well as grammar and logic. If we should assume that, economically speaking, the present system really taxes two persons for the same thing, the fact that the system has been in force for a very long time is of itself a strong reason against the belief that it has been overthrown by the Fourteenth Amendment, and for leaving any improvement that may be desired to the legislature.

The weight of the plaintiff's argument is that he is taxed for what he does not own. The bill seems to have been drawn on the dominant notion of a right attached specifically to the mortgaged property, that is to say, the notion that the property represents so many units of value, from which the mortgage subtracts so many, leaving only the remainder subject to be taxed; and this is the plaintiff's view. But there is a subordi

nate averment that the plaintiff has not been assessed for taxes in respect of personal property, and the allegation seems to convey, by indirection, that no deduction of the mortgage debt has been made from personal property, and to admit that such a deduction would have set the city right. As to the former notion, it will be observed that the mortgages were given by the plaintiff, and therefore charged him, as well as his land. If he should die, by the law of New York his personal property would have to exonerate the realty, so far as it would go. If he lives, and remains solvent, the chances are that he will pay the mortgages out of personalty. Therefore, the true deduction is not the amount of the mortgages, but the speculative chance that the land may have to be sold for the debt—a chance that would be insured at different rates to different persons. The other theory regards the mortgage debt as a deduction from total riches, to be compensated by an allowance to them indifferently, either in the valuation of the land or by a deduction from personal estate. And this logically leads to the conclusion that no scheme of taxation is constitutional that does not make allowance for all obligations and debts; a conclusion that the plaintiff seems to accept, while he does not make it plain that he does not receive both in law and in fact such an allowance by a deduction of debts from personal estate.

It cannot matter to the plaintiff's argument whether the obligation is directed to a specific object or to the whole mass of objects owned by the party bound. In the one case, as much as in the other, the obligation will take certain units of value from his riches, when under the compulsion of the law it is performed. But it is an amazing proposition of constitutional law that the law cannot fix its eye on tangibles alone and tax them by present ownership without regard to obligations that, when performed, would make some of them change hands; for instance, that under the Fourteenth Amendment a man having a thousand sheep as his only property could not be taxed for their full value without allowance for an unsecured debt of five thousand dollars, even if his creditors should be left untaxed.

a matter that hardly would concern him. *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Merchants' & Manufacturers' Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 464; *People* v. *Barker*, 155 N. Y. 330, 333. Undoubtedly he would be taxed for more than he owned if his total riches were computed on the footing that the law would keep its promise and make him pay, and that what would be done should be treated as done. If he owned other property, still there would be the chance that the sheep might be seized on execution, and, as we have said, the liability of the mortgaged land is no more, although the chance may be greater. It is a sufficient answer to say that you cannot carry a constitution out with mathematical nicety to logical extremes. If you could, we never should have heard of the police power. And this is still more true of taxation, which in most communities is a long way off from a logical and coherent theory. And it may perhaps be doubted whether there is even a logical objection to the sovereign power giving notice to all persons who may acquire property within its domain that when it comes to tax it will not look beyond the tangible thing, and that those who buy it must buy it subject to that risk.

The plaintiff's contention that the mortgage must be deducted from the land, whether the mortgage is taxed or not, stated a little differently, is that he was entitled to an apportionment of the tax to his interest, and that if the title to a lot is split up the government cannot tax it as a whole. To this we cannot agree, although it should be mentioned that the Greater New York Charter permits the owner of any interest to redeem it separately. Sec. 920. We have assumed so far that the tax on this real estate is a debt that might be collected by a personal suit against the plaintiff. As a matter of fact it is not collected in that way and we gather from what was said and admitted at the argument that it is doubtful at least whether such an action would lie. See *Durant* v. *Albany County*, 26 Wend. 66; *City of Rochester* v. *Gleichauf*, 82 N. Y. Supp. 750. Suppose that the tax law should operate only *in rem*, against

a lot defined by the limits of a separate title, and should simply give notice by sufficient means to all the world that it would be sold unless within a certain time some party in interest should see fit to pay a certain sum. Notwithstanding the position of the plaintiff, it cannot be doubted that such a proceeding would be as valid as the imposition of a personal liability upon individuals according to their interest. See *Witherspoon* v. *Duncan*, 4 Wall. 210, 217; *Castillo* v. *McConnico*, 168 U. S. 674, 681, 682. But the notion of a proceeding *in rem* is at the bottom of the usual tax on land, even where, as in Massachusetts, there is a personal liability superadded. This is shown by the doctrine that a valid tax sale cuts off all titles and starts a new one. *Hefner* v. *Northwestern Life Ins. Co.*, 123 U. S. 747, 751; *Emery* v. *Boston Terminal Co.*, 178 Massachusetts, 172, 184. Of course there is no question of allowances or deductions upon a proceeding *in rem*. All interests are proceeded against at once.

If there is no personal liability in New York the levy of a tax is a proceeding *in rem*, whatever requirements may be made for notice by naming parties in interest, and even if naming them is a condition to the validity of the tax. Indeed, it may be assumed that primarily it is such a proceeding in any event, and as a proceeding *in rem* might be sustained, even if the personal liability failed. A tax on special interests is not unknown, *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375, 381, but the usual course is to tax the land as a whole, and that we understand to be the way in New York. "In all cases the assessment shall be deemed as against the real property itself, and the property itself shall be holden and liable to sale for any tax levied upon it." Laws of 1902, c. 171, § 1. See Greater New York Charter of 1901, §§ 1017, 1027.

More might be said, but we will add only that while in order to meet the plaintiff's arguments we have taken his bill as presenting the question that we believe it was intended to present, the assumption hardly could be made if our opinion otherwise was on his side. It does not appear that he has not received

an allowance for his mortgage debt except by a conjectural inference. Among the matters that we do not consider is whether the plaintiff has any remedy except proceedings for an abatement, when he admits that he was liable to a tax and disputes only the amount.

Judgment affirmed.